

ADVERTISEMENT.

SEVERAL of the Fees payable to the Clerks and Officers of Court having been augmented after the greater part of this Treatise had come from the Press, the Text will be found in some instances to differ from the Table to be found in the Appendix. In such cases the Table is to be preferred.

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h. Scotland.

Session Court
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NEW
FORM OF PROCESS

BEFORE THE
COURT OF SESSION
AND
COMMISSION OF TEINDS;

WITH
A GENERAL ACCOUNT OF THE COLLEGE
OF JUSTICE,

AND
A TABLE of the FEES payable to the CLERKS and
OFFICERS thereof.

BY A MEMBER OF COURT.

EDINBURGH:

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Entered in Stationer's Hall.



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P R E F A C E.

WHEN we reflect upon the numbers whose chief employment is before the Supreme Court, and at same time consider the unwearied attention necessarily required, before, by *practice only*, they can attain a competent knowledge of those regulations by which their business must be conducted, it becomes matter of surprise that there is not any book now to be found, which can lighten, in any degree, so laborious a study.

For independently of the consideration, that the last Treatise on this Subject is wholly out of print, and without detracting from the merit of an author, whose *general outlines* we profess to have followed, it is yet sufficiently obvious, that a book, composed more than twenty years ago, could give but little assistance with regard to forms, almost one half of which

which have been entirely changed, in the form
course of less than half that period. be mo

It is the intention, therefore, of the fol- be un
lowing sheets, to supply that want, as far ed to
as possible. And though a work of this justice
nature must needs be principally calcu- tially
lated for the young and unexperienced, yet ture,
those of the longest experience and the best herfel
employment will perhaps find somewhat. A v
among so great a variety of new regula- allow
tions, which they may not have become with
acquainted with, through the *medium* of Whet
practice. such
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To such as are studying with a view to
the bar, or have recently engaged in that
profession, the present attempt, we flatter
ourselves, must prove worth notice. To
those of the profession who are even of
some standing, a perusal may be found
not altogether unprofitable.

Indeed it is a matter somewhat sur-
prising, to see Counsel of considerable prac-
tice and great abilities, referring them-
selves daily, in matters of form, to every
clerk and assistant in court. If this pro-
ceeds from any opinion that points of
form

, in the form are below their regard, no idea can be more erroneous; since that can never be unworthy of a Lawyer which is allowed to be conducive to the furtherance of justice: and *Form* is an attendant so essentially necessary in every court of judicature, that, without her guidance, *Justice* herself would often go astray.

A work of this kind, therefore, must be allowed to be of some value, if executed with a due degree of care and ability. Whether the present attempt deserves any such praise, that is left with the reader to determine.

ERRATUM.

Page 32. l. 2. for "pursued by," read "belonging to."

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Agents

FORM

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X. 0

XI. 0

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GENERAL ACCOUNT

OF THE

COLLEGE OF JUSTICE.

THOUGH the regular administration of ^{St. David II.} justice was very early committed by the ^{c. 8.} crown to stated judges, yet our kings continued to exercise jurisdiction in a variety of causes, by the advice, and with the concurrence of their council; particularly in complaints against the sentences of the judges ordinary.

This practice being found inconvenient, ^{1425. cap.} James I. established a new court, called the ^{65.} Session, to which the judicial powers formerly vested in the council were transferred. But as this court had no fixed time or place for administering justice, and were to meet only occasionally, as his Majesty should appoint, it soon fell into desuetude; and it was found necessary to pass two several acts of parliament, enacting, ^{1469. c. 27.} that all causes should come first before the ^{1475. c. 63.}

B

sheriffs,

sheriffs, stewarts, bailies, and other judges ordinary; and that if they neglected to do justice, or administer it partially, the party aggrieved should apply to the king and council.

1487. c.
105.

Notwithstanding these statutes, ordaining all causes to be first carried before the ordinary judges, the practice seems still to have been continued, of bringing processes before the king and council in the first instance. This gave occasion to another statute, which declared, that no actions should be determined by the king and council, excepting the king's own causes, and actions and complaints made by kirkmen, widows, orphans, and pupils, actions of foreigners, and those directed against officers of the law, either for not doing their duty in the execution of their offices, or where the officers themselves are parties.

1503. c. 58.

Some time thereafter it was enacted, that a council should be chosen by the king, to sit continually in Edinburgh, or in what other place the king should appoint, to decide in all civil causes and complaints, daily as they happened to occur. This was called the *daily council*; the judges of which court were invested with the same powers that the Lords of Session formerly had.

But neither was this court of long continuance; the civil jurisdiction which it exercised

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cised being very much limited : for which reason it was judged proper to erect a new court, whose jurisdiction in civil matters might be universal and supreme.

This was effected by James V. who, in the year 1532, new modelled the court of the daily council, dignifying it with the appellation of *The College of Justice*, and the judges with that of *senators*. The judges were likewise styled *Lords of Council and Session*, having come in the place of the ancient *session* and of the *daily council*, as already noticed ; and this appellation they still uniformly retain in all their acts and decrees.

We learn from the act of institution, that the College of Justice consisted not of the judges only, but also of the clerks to the signet, the advocates or procurators, and the macers and other servants of court. All these enjoy several valuable immunities and privileges which have been bestowed on them by the Crown, and ratified in Parliament from time to time ; and which, by an act of federunt, are extended to certain other persons after enumerated, as being intimately connected with the College of Justice.

Those intitled to the privileges by this act are :

B 2

The

A.S. 23d
Feb. 1687.

The Lords of Session,
 Advocates,
 Clerks of session,
 Clerks of the bills,
 Writers to the signet,
 Depute clerks of session, and one substitute for
 registrations in each office,
 Three depute clerks of the bills,
 Clerks of exchequer,
 Directors of the chancery and their deputies,
 Two clerks of chancery,
 Writer to the privy seal and his deputy,
 Clerks of the general register of feifins and
 hornings,
 Macers of the session,
 Keeper of the minute book,
 Keepers of the rolls of the inner and outer
 house,
 One actual servant (*i. e.* writing clerk) of each
 Lord of Session,
 One servant of each advocate,
 Four extractors in each of the three offices of
 the clerks of session,
 Two servants employed by the clerk register in
 keeping the public registers,
 Keeper of the session house,
 Keeper of the advocates library.

6Ann. c. 26.

§ 11.

And by the act establishing the court of ex-
 chequer in Scotland, the barons and other

mem-

members of that court are declared to have the same privileges and immunities as the members of the College of Justice; excepting that they may be sued before the Session for causes not competent to the court of exchequer.

We proceed to give a brief account of the several branches of the College of Justice, which shall be confined to such matters chiefly as tend to elucidate the practice in proceedings before the court, that being the principal object of the present treatise.

SECTION I.

Of the Judges.

BY the institution of the court, the judges consisted of seven churchmen and seven laymen, with a president, besides three or four other lords of the great council, all nominated by the king. The *quorum* is declared to be ten, besides the chancellor or president; the chancellor, when present, always to preside: but it appears that the practice soon after had reduced the *quorum* to nine ordinary lords.

By an act passed during the usurpation, churchmen are incapacitated from exercising any office in this court; and though this statute was annulled by the recifory act of Charles II.

no

no clergyman has since that period been admitted to the bench.

The office of chancellor of Scotland was suppressed at the Union; and the nomination of extraordinary Lords has been since taken away by special statute.

10 Geo. I.
c. 19. § 1
& 2.

At present the court consists of a president and fourteen ordinary judges, all laymen whereof nine make a *quorum*; and, in absence of the lord president, one of the ordinary judges is elected by the court to preside for the time.

Before the Restoration, the right of naming the judges was sometimes claimed by the parliament; and the court acquired right, by special statute, to elect their own president and also to reject the king's presentee, to supply any vacancy on the bench. But since the above-mentioned period the nomination of the judges has remained solely with the crown who appoints them for life; and, though the court may remonstrate if a person they think improper be represented, yet the power of rejecting him is now taken away, and they must receive him if the king shall insist upon it.

10 G. I.
c. 19.

1592. c.
132.

Art. 19.

No person can be admitted a judge in the court till he be twenty-five years of age at least; and by the treaty of union of the two kingdoms, he must have served as an advocate or a principal clerk of session for five years,

been a writer to the signet, for ten; and in the case
 a writer to the signet, he must undergo the
 ordinary trials on the Roman law, and be found
 qualified two years before he can be named.

On a vacancy in the bench, a presentee is
 named in a letter from his majesty directed to
 the judges, requiring them to take trial of his
 qualifications, and admit him; the form of which
 is fixed by act of federunt, 31st July 1674.

In order to preserve a strict rectitude in their
 decisions, the lords are prohibited from judging
 the causes of their near relations, such as
 father, brother, or son, whether by affinity
 or consanguinity; as also in the cause of an
 uncle or nephew by consanguinity, though that
 relation by affinity is no ground of declinature. 1594. c.
212.
 It has likewise been decided that relation to the
 partners of a banking company founds not a
 declinature; nor the circumstance of the judges
 being heritors in a burgh, in a question where
 such burgh is a party; upon this footing, that
 where such declinatures sustained, there would
 remain a *quorum* of the lords to determine
 the cause. 1681. c. 13.
A. S. 28.
June 1787.

The jurisdiction of the Court extends to all
 civil actions; and in particular cases to the pu-
 nishment of crimes, such as forgery and fraud,
 when not capital; many instances of which are
 to be found throughout the acts of federunt.

The

The judges have also a power to decide upon the sentences of inferior courts, and on special grounds to review even those of their own. They are impowered by statute to regulate the manner of their own proceedings. And there is inherent in the Court a *nobile officium*, in virtue of which it exercises jurisdiction in cases not provided for by positive law.

1537.c.43
1540.c.93.

A.S. 21
Dec. 1661.
12 May,
1790.

The period of the winter session is from the 12th November to the 11th of March; that the summer commences on the 12th of May and ends on the 11th of July.

2 G. 3. c.
27.

And the Lords are impowered to adjourn on such day betwixt the 20th December and 15th January, yearly, and for such time as they shall judge proper, not exceeding the space of twenty days.

The Court sits every week-day during the session, Monday excepted; which is left open that the lawyers and agents may have time to prepare for the business of the week. And the Lords are directed to advise all causes with open doors, some special cases excepted, at the discretion of the judges.

1693.c.26.

Formerly, during the vacation of the Court, no inferior judge could hold courts for civil causes, without a dispensation from the Court of Session: but now sheriffs are an exception from that rule. These dispensations are granted

20 G. 2.
c.43. §29.

decide upon an application by way of common
 on special, presented to the lord ordinary on the bills;
 their own and the time of dispensation was formerly limit-
 ed to the 20th March and 20th August, but
 And then the alteration of the style, is prorogued to
 the 2d of April and 2d of September.

Order of
 Court, 21
 July 1696.

Order 16
 Feb. 1753.

The session-house, where the Court meets, is
 divided into two separate apartments. The
 whole lords sit, for the determination of special
 causes, in what is called the *inner-house*, where
 all judgments and acts of the Court must be
 signed by the president, in presence of a *quorum*
 of the lords sitting in judgment, and according-
 to his lordship annexes always to his subscription
 P. D. i. e. *In præsentia dominorum*.

Stat. 1693.
 c. 18.

The fixed hour of meeting is ten o'clock; ex-
 cept on the four last federunt days of the win-
 ter session, and the two last federunt days of the
 summer session, upon which the Court is ap-
 pointed to meet precisely at nine. The usual
 practice of the Court, however, is to meet at a
 quarter past ten; except on a press of business,
 when their lordships meet at such earlier hour
 as occasion may require: intimation of which
 is put up on the walls of the inner and outer-
 house, the day preceding.

A. S. 6 June
 1733.
 — 5 June
 1734.

In the outer-house, all the judges, except the
 lord president, sit by turns, weekly, for hearing
 and determining causes in the first instance.

St. 1693.
 c. 19, 21.

granted

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Their

Their decrees are subject to the review of the lords, providing application be made by the party within the time fixed by the rules of Court; otherwise they become final, and are held to be decrees of the whole Court, in the same manner as if pronounced by the lords in the inner-house.

The roll of outer-house causes is delivered at the meeting of the inner-house each Tuesday morning, by the lord president to the ordinary for the week, who immediately takes his seat and begins to hear causes accordingly. On the subsequent days of the week, his lordship comes to the bench at ten o'clock.

The ordinary judges also, by turns weekly advise all bills of suspension and advocation, and also common bills, praying warrants for summonses, and summary diligence. The judge officiating in this department is called the *Lord Ordinary on the bills*: and the duties of it require attendance in time of vacation, at least on Tuesday and Thursdays, as well as during the sitting of the Court.

By the present practice, the judge who sits as ordinary in the outer-house, officiates for the same week as lord ordinary on the bills.

Two of the judges also are appointed weekly by turns to attend the examination of witnesses. These are called the *Ordinaries on oaths and witnesses*.

A. S. 25
Dec. 1708.

Clerk

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esses; and they judge in all questions relating
by the taking of proofs; such as objections to wit-
rules of evidence, and the propriety of questions put to them.
and an One of the ordinary judges is also appointed A.S. 1 Nov.
1693.
weekly by turns, to audit and prepare processes
in which proofs have been taken, and to report
the state thereof in writing to the Court. The
judge so officiating is called *the Ordinary on con-
cluded causes*.
The sentences of all these Ordinaries are sub-
ject to the review of the Court. The order of
rotation, by which they succeed each other in
their respective duties, is specially determined
by acts of *federunt*, 5th June 1711, 8th August
1789, to be afterwards more particularly taken
notice of.

SECTION II.

Clerks and other Officers of Court.

THE principal Clerks are six in number;
their duty is to attend the lords in the in-
ner house, and write out the *federunt*, and all the
acts and decrees of Court. They are appointed — 17
June 1593.
by the king; must be qualified for their office
in terms of the act of regulations 1695, §. 10.
and before their admission must undergo a trial,

the form of which is laid down by act of *se-*
runt, 2d June 1697.

There are also six deputy clerks, who act by
commission from the principal clerks, and at
A.S. 3 Nov. 1677.
— 1 June 1681.
tend the business in the outer-house; and they
are especially enjoined to minute down the de-
fences, replies, and duplies there proponed.

The clerks have three distinct offices or suites
of apartments in the register-office, where they
keep their papers. In each of these there are
two principal and two depute clerks, besides se-
veral extractors, commonly six or eight, whose bu-
siness it is to extract the decrees and sentences of the
Court; which extracts must be signed by one of
the principal clerks. In each office there are also
two keepers of registers, to whom are given in
all bonds, protests of bills, and other writs that
are meant to be put upon record, either for pre-
servation, or for obtaining summary execution
upon them. And subordinate to both principal
and depute-clerks, there are in each office
two servants, called closet-keepers, whose busi-
ness it is, although no members of Court, to at-
tend the ordinaries in the outer-house; and also
to attend closely at their respective chambers in
the register-office, for the purpose of receiving
and giving out processes to the agents and their
clerks. These closet-keepers generally carry

through

rough the bulk of the business, which ought
strictly to be done by the depute-clerks.

Besides these there are two principal clerks to
the bills, named by the king; and one depute
commissioned by them; whose business it is to
present to the lord ordinary on the bills, all bills
of suspension, advocacy, bills for diligences, for
or summonses, and so on, as lodged with them; and
they write the interlocutors thereon. And there
are also two other assistants in that office named
the principals.

There is likewise a clerk to the minute book,
whose department is to insert in it a short minute
journal of all protestations, acts, and decrees,
made and pronounced in Court.

This officer, as also the principal clerks of ses-
sion, and principal clerks to the bills, have all
their commissions from the Crown for life.

Next are the two keepers of the rolls for the
inner and the outer-house. The appointment
the first of these was formerly in the chancel-

of Scotland; but since the Union of the king-
doms he has been named by the Court, and the
lords have declared their opinion, that until a
commission shall appear in terms of the act of
regulations 1672, the office should be bestowed
on the person serving the lord president as clerk

at the time, and his act of nomination bears ac-
cordingly that he shall hold the one office so
long

A. S. 4 Feb.
1685.

— 11 Jan.
1604.
— 8 Nov.
1649.

St. 1672.
c. 16. § 5.

A. S. 2 Nov.
1748.

— 15 Jan.
1788.
— 14 Nov.
1789.

long as he continues to serve the lord president in the other.

St. 1672.
c. 16. § 2.
A. S. II
July 1760.
— 28 Feb.
1662.

The keeper of the outer-house rolls is appointed by the lords, who usually grant his commission for life; though sometimes they give it during pleasure only.

Each judge also has a private clerk, whose business it is to make up his hand-roll, take care of processes which are to be advised by him out of court, and write out the interlocutors thereon when pronounced.

— 29 June
1757.
— 23 June
1694.

There are likewise two keepers of the parliament house, who are appointed by the Court and the Magistrates of Edinburgh alternately, the order of nomination was settled by compact between these two bodies.

— 17 June
1760.

The last officers of Court to be here taken notice of, are the four macers; whose business it is to call the causes, in the course of the several rolls, and to execute the orders of the Court. Three of them are appointed by the Crown; the fourth is in the gift of Mr. Moncrieff of Readie.

1 July
1777.

The Court has a common seal, which is used on particular occasions; such as in reports to his Majesty or parliament, decrees against foreigners, and commissions for taking proofs in foreign parts. And it is to be always kept in the chamber-chest or press, in the inner-house, by special appointment of the Lords.

— 4 March
1748.

SECT

SECTION III.

Faculty of Advocates.

THE business of the faculty is to plead all causes which come before the court ; under the direction of the Lords, to whom they have always been subjected. This they do either *va voce*, or in writing, as the nature and circumstances of the case require. All defences, therefore, answers, replies, representations, or other writings given in to the Lord Ordinary, and all petitions, answers, informations, or others committed to the whole Lords, must be subscribed by an Advocate. And although the court were formerly in use to receive papers subscribed by the parties alone, yet that was found to occasion so much trouble and irregularity in the proceedings, that an act of *federunt* was made declaring that all papers given in to the Lords, whether in the inner or outer-house, and signed by the party, should be also signed by an advocate.

A.S. June
20, 1676.
Reg. 1695.
§ 23.

5 March
1789.

At the institution of the College of Justice the number of advocates was limited to ten ; which number, however small, was not then held up, eight only being named in the statute. For supplying the number, others were to be received

St. 1537.
c. 64.

received with advice of the Lords ; and they are obliged to serve every person for wages, unless they can allege a reasonable excuse.

The profession of an advocate has been always held honourable ; and it leads to some of the highest offices in the state ; for out of the body, almost exclusively, are nominated the judges of the courts of session, justiciary, and exchequer ; and they have the sole privilege of being appointed sheriff-deputes in the several counties.

Antiently, it has been already said, the advocates were to be admitted by the court ; and down to the middle of the last century they were received into the faculty without any examination.

The education of gentlemen intended for the bar was, serving advocates in practice for a term of years, after which they applied to the court for setting forth their service ; and, upon producing certificates of their honesty and abilities, they were admitted to the office.

Minutes of
Faculty,
7 Nov.
1664.

Afterwards they were obliged either to undergo an examination in the civil law, which was said to be the ordinary course of entry ; or to pay an additional sum when they entered by petition to the Lords, which was filed the extraordinary way. The method of trial appointed by the faculty, was ratified by fund

cts of federunt; and in 1692 the Lords declared "that in time coming they will not dispense with the ordinary way of trial of advocates, unless first they be well informed of the person's integrity, good breeding, honest deportment, and fitness for exercising the office of an advocate, and that he has attended the house a considerable time for qualifying himself in order thereto; and thereupon they will remit him to the dean and faculty of advocates to be tried concerning his knowledge of the practice of our law, the styles and form of process."

18 Jan.
1684.
6 July 1688.
25 June
1692.

At present advocates, before their admission, are subjected to a trial of their knowledge, both in the civil law, and the law of Scotland.

A. S. 28
Feb. 1750.

The fees of admission, as may naturally be supposed, have often varied. At the institution of the college, they would seem to have been voluntary. In 1662 they were fixed at 20 merks. Soon after that period they again became voluntary. Thereafter they were settled at 500 merks, for such as should enter on examination, and 1000 merks for such as should enter by petition to the court, power being reserved to the Lords to modify the 500 merks, when they should think it reasonable.

— 28 Feb.
1662.
— 7 Feb.
1679.
— 18 Jan.
1684.

In 1720 the fees were raised to 40*l.* sterling. In 1762 they were made 60*l.* Since which

A&F. Facul-
ty, 5 Jan.
1720.
A. S. 29
June 1762.

D

time

A.S. 6 Dec. time they have been repeatedly augmented
 1769.
 — 11 Mar. first to 80*l*. then to 100*l*. and last of all to 150
 1784.
 — 8 July sterling.
 1790.

SECTION IV.

Clerks to the Signet.

THE society of clerks or writers to the signet were, in antient times, the proper clerks to the secretary of state, commissioned by him to frame and subscribe all writs passing the seal and signet of his majesty. They still hold the commissions from the keeper of the signet, though that office, since the Union, has generally been held by others than the secretaries of state.

St. 1695.
 c. 40.

The members of this body have the exclusive privilege of subscribing all writs which pass the signet, under a few exceptions; and of preparing and signing bills of advocacy and suspension: also of preparing and signing signatures, and other warrants of charters and writs passing the other seals, and presented to the barons of exchequer; and they are declared to be sole clerks to appraisings led upon dispensation and to services before the macers.

1672. c. 16.
 § 33.

The importance of the business which is thus intrusted to the writers to the signet, points

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the necessity of their having a regular education, in order to fit them for the duties of the office. Accordingly their admission proceeds on an examination of their knowledge in law, and the forms of deeds occurring in practice. If, upon such trial, the candidate shall be found unqualified, the society has a power of rejecting him. And he is not intitled to apply for admission till he shall have served as an apprentice to one of the clerks to the signet for five years, and made oath to his actual service, as an apprentice, during that period.
The members of this society, as such, have the privilege of practising as agents before the court, under the direction and controul of the clerks, whose acts of *federunt*, they, like the other branches of the College of Justice, are enjoined to observe.

A.S. 25
June 1760.

SECTION V.

Agents and Solicitors.

ALTHOUGH agents are not members of the College of Justice, they are so much connected with the business of the Court that it becomes necessary here to take notice of them.

While the education of those gentlemen who were intended for the bar depended on their

St. 1672.
c. 16. § 31.

serving advocates in practice, they, during such service, acted the part of agents, under the direction of their masters, who were the principal conductors of the processes; and therefore all other agents were discharged and debarred the house as burdensome to the lieges. But, since that practice has ceased, agents have become necessary; and they are now held to be the chief conductors of processes, and as such the Court holds them answerable; for which reason the fines and penalties are no longer inflicted on the advocates but on the agents.

The proper business of an agent is, to collect the necessary information in the process he is employed to conduct; upon which he makes up a state or memorial of the case, and the circumstances attending it, from which the advocate pleads the cause. It is the business of the agent likewise to attend to the particular steps of procedure, by bringing the action in due time into court, making the necessary inrolments, attending to the reclaiming days, and every other circumstance which may affect the issue; the duty of the advocate being confined merely to pleading and writing in the cause when specially employed for that purpose by the agent.

The agenting-business being, for a considerable period, open to all without distinction

many

any persons undertook that branch who were nowise qualified to discharge the duties it with propriety. To remedy the inconveniencies thereby occasioned, the Court made an act of *federunt*, ordaining that no person, except clerks to the signet, and first clerks an advocate, should be permitted to act as an agent, unless admitted and inrolled as such, in the manner therein directed.

10 Aug.
1754.

This act of *federunt* was ratified and extended by another in the 1772, which ordained the admission of agents to be by petition to the Court, who remit them to examiners to take notice of their qualifications for the office, and to receive evidence of their moral character; and the act excludes all persons from acting in the capacity of agents, except writers to the signet, clerks to advocates, and those admitted in the manner above mentioned. This act has been lately enforced; and it is farther enacted, That on every production of papers, and also upon every representation, and written copy of every petition, answer, memorial, or information given into process, the name of the agent for the party who gives it in shall be marked on the back thereof, under the penalty of 20s. sterling, in every case, where such marking is omitted.

11 March
1772.

A. S. 13
Feb. 1787.

The

many

A.S. 7
Nov. 1690.

The Lords' private clerks, and the servants
the clerks of session, are discharged to agents
any processes, except in their own and those
their masters. Extractors also are prohibited

— 4 Jan.
1751.

from being agents, and agents from acting
extractors: and an instance occurs in the book

— 8 Feb.
1763.

of *federunt* of an extractor being sent to prison
for acting as an agent.

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FORM OF PROCESS

IN THE COURT OF SESSION.

PART I.

Processes commenced in the Court of Session.

CHAP. I.

Preliminaries of Process.

BY preliminaries of process we here understand such steps as must necessarily be taken, before the cause can be brought to a hearing before the judge. These consist in issuing the summons, citing the defender thereunto, calling the summons in court, and certain other procedure calculated for bringing the process before the Lord Ordinary.

The *summons* is a writ in the king's name, issuing from his signet, and subscribed by a clerk to the signet. It contains in substance a

FOR narrative of the pursuer's claim, or ground of action; a clause subsuming that the defender has been required, but has refused, to do justice to the pursuer; a conclusion for a decree; and charge or warrant to messengers at arms for citing the defender to appear at a certain time, to

to show cause why judgment should not be pronounced against him ; with certification that, if he do not appear, decree will go out against him in terms of the libel. Sometimes the summons bears a more special certification ; as where the pursuer in his libel refers the cause to the oath of the defender, in which case the certification is, that if he fail to appear and depone in terms of the reference, he shall be held as confessed, and decree be pronounced against him accordingly.

In order to give the defender an opportunity of preparing his defence and attending the court in due time, he is allowed a certain space, called the *induciae*, within which no procedure can be had against him. That we may understand clearly what the *induciae* should be, it is necessary to attend to a distinction observed between actions which require a proof by witnesses and those which can be verified instantly by writ.

Hope's Minor Practics, tit. I. § 4.

Anciently, in actions of this latter kind, the defender was summoned to appear in court, on a day certain, and failing his doing so, the pursuer obtained decree instantly against him. When a proof by witnesses was required, the procedure in the cause became more circuitous ; being necessary to give the defender two several citations, upon two separate summonses.

When

When the days of compearance specified in the first citation were elapsed, the summons was called in Court, when the pursuer obtained an opportunity for proving, and at the same time letters of continuation, which were the warrant of a second summons for citing the defender to appear on a future day, with certification that, in case of failing to do so, judgment would be given against him.

These second summonses were abolished by *A. S. 24 May 1595.* 1672. c. 6.

The act 1672, which authorised the second citation to be given on the same summons that warranted the first; but the pursuer was obliged to wait the lapse of the first citation, before the second could be given; till it was made lawful, by 1693. c. 12 to give one citation for both diets upon the same summons, providing the same be done by a messenger at the summons; which mode of citation has continued in practice ever since.

By this distinction between summonses, which formerly required continuation, and those which did not, we now determine what summonses are on two diets of compearance, and what require only one; for it is a general rule that all summonses which formerly abode continuation require two diets, while those which did not are on one only.

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St. 1466.
c. 6.

1683. c. 43.

The *induciæ*, for the first diet of comparance are, in the ordinary case, twenty-one days; but, if the defender resides in Orkney or Zeland, he must be allowed forty; and sixty days if forth of Scotland. When the summons requires a second diet, the *induciæ* are six days if the defender is within Scotland, except he resides in Edinburgh or its suburbs, in which case he may be cited on twenty-four hours (*a*). If forth of Scotland, the *induciæ*, for the second diet, must be fifteen days.

A.S. 29 June
1672.

Some summonses, for special reasons founded in the nature of the action, are allowed to be raised upon shorter *induciæ* than the ordinary ones of twenty-one and six days; and they are therefore said to be privileged. It would appear that a practice had crept in, of obtaining a privilege for almost every summons, by deliverance of the Lords upon bills presented for that purpose, which usually passed of course. To remedy the abuse, an act of sederunt was made ascertaining what summonses should be privileged, and the *induciæ* on which they should respectively proceed, as in the following table.

(*a*) This, it is believed, however, has gone into disuse; six days being always allowed, even when the defender resides in Edinburgh or the suburbs.

PREL

(b) This act
t. 3. § 2

PRIVILEGED SUMMONSES,

On fifteen days.

Summons of recent spuilzie, if raised within
fifteen days after committing the spuilzie,
— of ejection,
— of intrusion, and succeeding in the vice.

PRIVILEGED SUMMONSES,

On six days.

Summons of removing,
— aliment,
— exhibition,
— forthcoming,
— transference,
— pointing the ground,
— wakening,
— special declarator
— suspension,
— preventor (b),
— transumpt.

The act of federunt above mentioned does
appear to derogate from the general rule we
before laid down, with regard to what sum-
mons pass on two diets of compearance, and
what require only one. Therefore, it should

(b) This action is long ago obsolete. Erskine's Inst.

seem that such of the above summonses as can be instantly verified *scripto*, may pass on one diet, but that such of them as require a proof by witnesses must still pass on two; in which case the second diet will be six days, as usual, which is the period also expressly mentioned in the act, with the exception of the inhabitants of Edinburgh and suburbs, who, it is said, may be cited on twenty-four hours, although, as already noticed, this short citation seems to have gone into disuse.

At the same time, it must be remarked that in practice, the first class of these privileged summonses are commonly raised on *one* diet of fifteen days, and the last class on *two* (*c*) diets of six days each, whether the libel can be verified by writ or not; so that perhaps the safer way is to abide by this last method, which, though perhaps it originated in error, is yet sanctified by an almost uniform practice.

By the present practice also summonses are raised in Multiplepoinding, and

Cessio bonorum,

pass on one diet of six days, though not comprehended in the act of federunt.

(*c*) This observation does not apply to simple warrands, which always pass on one diet of six days; but when a transference is joined, two diets of six days each, are necessary.

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The short *induciæ* in privileged summonses do not extend to those who reside in Orkney or Shetland, nor to persons forth of Scotland, who, in every case, must be summoned on the ordinary *induciæ* before explained.

To intitle the above privileged summonses, those of multiplepoinding and *cessio bonorum* included, to the benefit of the short *induciæ*, they should regularly pass upon bills for their warrants; although the practice of the signet is, to signet all these summonses without any bill, providing they contain two diets.

Bills are likewise required in expeding the following summonses, *viz.*

- (c) diets, Adjudication,
- Ranking and sale,
- Reduction, improbation,
- Summonses for interrupting the prescription of real rights, (d)

Declarator of bastardy, or *ultimus hæres*:
and, in general, all summonses which require the concurrence of his Majesty's advocate. These bills pass of course in the bill chamber, without producing any warrant.

(d) This summons, with its executions, must be recorded in the register of interruptions, within sixty days; days after the date of the execution: 1696, c. 19.

The

The summonses which require the concurrence of the King's advocate, are those in which his Majesty has an interest; such as declarator of bastardy, *ultimus hæres*, &c. and also all such as contain a conclusion for improbation: which concurrence is usually adhibited by the substitute-keeper of the signet, the Lord Advocate's clerk, or others authorised by his lordship for that purpose.

A.S. 11 July
1672.

By an act of federunt in 1672, summonses containing two diets were ordered to be signed by the clerk-register, or in his absence, by one of his deputies, or the ordinary clerks of session. This being deemed an infringement of the privileges of the writers to the signet, an act of parliament was passed, which ordained, that all writs passing the signet, called the signet of the Lords of Session, should be subscribed by a writer to the signet; excepting only letters of diligence in processes before the Session.

St. 1695, c.
40.

Summonses formerly were executed while blank, and they were fully libelled only when given to the clerk of process to be called in court. But this improper practice was checked by two several acts of federunt, which required that all summonses should be filled up before executing. The universal practice now is, to libel all summonses fully, even before signeting; except those before the commission of tiends.

A.S. 15 Feb.
1723.
Feb. 19.
742.

If

If a foreigner is pursuer, he must appoint an attorney in this country, in whose name, jointly with his constituent's, the action must proceed, in order that the defender may recover his expenses, in case he be found entitled to them; the factor or attorney being liable for the same.

No suit can be instituted against a foreigner, unless he reside in Scotland, or has an estate there heritable or moveable. If he either resides, or has an heritable estate in this kingdom, he may be sued in the same manner as natives. But if he has only moveable effects in Scotland, he is held to be so little subject to the jurisdiction of its courts, that no action can proceed against him, till those effects be attached by an arrestment *jurisdictionis fundandæ causa*.

Erskine
b. 1. t. 2.
§ 19.

To avoid the confusion which formerly was occasioned in actions against debtors, by calling a multitude of them in one summons, the number of those defenders was limited to six, by the act of regulations 1695; and the rule, though sometime in disuse, is at present in general observance.

Act regls.
1695. § 28
Act writ.
sig. 26 Nov.
1770.

That the time of the Court might not be wasted in considering causes of no importance, actions for causes not exceeding 200 merks are discharged to be brought before the session in the first instance; unless for special reasons, to be set forth in the bill of the summons,

St. 1672.
c. 16. § 16.

mons, and admitted of by the Lord Ordinary excepting, however, 1st. Causes pursued by members of the College of Justice; 2dly, Actions of debt due to merchants, vintners, and others in burgh, for goods sold by them to such as dwell not within the county where the goods are furnished; because of the expence that would otherwise attend recovery of the sums in dispute. Advocations from inferior courts were likewise discharged, when the value was within 200 merks, which sum is by a later statute extended to 12*l.* sterling.

1663.c.9.

20 Geo. 2.
c. 43. § 38.

The second exception above-mentioned, contained in the act 1672, is by the practice frequently overlooked, in respect to the description both of pursuer and defender; actions being brought against debtors without regard to the nature of the contractions, or their residing in different shires, and that without passing any bill as a warrant of the summons.

1540.c. 75.

If the defender resides in Scotland, he must be cited either personally, or where he has his actual residence for the time. If he is forthwith the kingdom, he must be cited edictally at the market cross of Edinburgh, pier and shore of Leith.

When the defender is minor, his tutors and curators must be also called; not personally, but by name, but edictally, at the market cross of Edinburgh.

Ordinary the head burgh of the shire where the pupil or
 by men minor resides; or at the market cross of Edin-
 Actions burgh, and pier and shore of Leith, if the minor
 and other happen to be forth of the kingdom. The *indu-*
 as dwell *ica* given to the tutors and curators are always
 are for the same with those allowed to the minor him-
 at would self.

Erskine's
 Inst. b. 4.
 t. 1. § 8.

ns in d Where a married woman is defender, her hus-
 orts w and must also be called for his interest.

as with Societies and bodies corporate, such as magi-
 atute e strates and council, public banks, and the like,
 are summoned collectively, when met together,
 ned, co y delivering the citation to the presiding mem-
 ctice fr er, for himself, and in name of the whole body
 escripti or community, or otherwise, by citing them se-
 ns bein erally, like other defenders.

rd to t The officers of state, when his Majesty has an
 efiding tereft, are cited at the Exchequer-chambers,
 fting a and also at the market cross of Edinburgh, pier
 and shore of Leith, on sixty days, or sixty and
 , he mu teen, when two diets are necessary.

ne has b In choosing of curators an edictal citation is 1555. c. 35.
 s forth equired of all having interest, to be given "at
 lly at t the market cross of the head burgh of the
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 gudes."

utors a Vagrants, who have no fixed place of resi-
 fionally cence, may be cited at the market cross of the
 et cross ead burgh of the jurisdiction where they usually

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haunt:

haunt: and in times of public disturbance, persons residing where there is not *tutus accessus* are cited at the market cross of the head burgh of the next shire; application being made to the Court, and warrant granted for that purpose.

Erskine's
Inst. b. 4.
t. 2. § 17.

On this head it is to be observed, in the last place, that where the summons contains a reference to the defender's oath, in order to give effect to such reference, the citation must be given to him *personally*, if within Scotland, but if forth of the kingdom, an execution at the market cross, pier and shore, is held to be sufficient.

In every case where a summons is to be executed against a defender as forth of Scotland against tutors or curators, the officers of state and so on, it must contain a special warrant to that effect.

A.S. 15
Feb. 1723.
— 1 Jan.
1726.
— 19 Feb.
1742.

A full copy of the summons to the *will* must be given to, or left for each defender, in so far as concerns him, at the time and place of executing. And if he is forth of Scotland, three copies must be left for him at the market cross of Edinburgh, pier and shore of Leith respectively.

And this is to be understood to extend to tutors and curators, the officers of state, and all other defenders, whether called as principals, or for their interest only.

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But, by the acts of *federunt* establishing the above regulations, the following summonses are made exceptions from the general rule :

1. Adjudication,
2. Mails and duties,
3. Ranking and sale,
4. Exhibition *ad deliberandum*,
5. Choosing curators,
6. Transumpt,
7. Wakening,
8. Multiplepointing,
9. Pointing the ground,
10. Forthcoming,

all which may be executed without any doubles, whether the defender be in Scotland or not: but in a summons of pointing the ground a full double must be given to the heritor, and the same to the common debtor in a forthcoming. And in multiplepointings the defenders must each be served with a copy, expressing the designation of the pursuer, as alleged debtor to such person, or as tenant and debtor of the rents of such certain lands, to be mentioned in the copy.

The execution or return of the messenger must be subscribed by him, and by two witnesses present with him at the citation. And it is St. 1672. c. 6. enacted, " that all executions of summons shall bear expressly the names and designations of the parties pursuers and defenders: and that

"it shall not be sufficient that the same do re
 "late generally to the summons, otherwise the
 "execution shall not be sustained." This enact
 ment is calculated to prevent many gross abuses
 and therefore merits more universal attention
 than by the present practice is bestowed upon it.

In the *will* of the summons, the days of com
 pearance are generally left blank till the messen
 ger return his execution; in order that the *will*
 may be filled up, so as to correspond with the
 days of compearance expressed in the citation
 given the defender. For this purpose, the days
 of compearance are usually expressed in the
 summons thus; "the and
 "days of next to come:" in which case
 the citation must be given in such time that the
 last diet may fall within a year from the date of
 the summons. But if the words "*next to come*,"
 are left out, the first diet may be made within a
 year from the date of the summons, and the
 second diet within a year of the first.

Erskine's
 Inst. b. 4.
 t. 1. § 8.

Both days of appearance must be in time of
 session. But the Christmas recess is not, to this
 effect, regarded as vacation; consequently the
inducie of summonses run, during that period,
 in the same manner as if the Court was sitting;
 and if the days of appearance expire during the
 recess, the summons may be called immediately
 on the Court's sitting down.

A sum-

A summons may be called in Court any time within a year from the last diet; but if not called within that period, it falls altogether. If the defender, however, wishes to bring on the cause, he is entitled, any time after the days of appearance have elapsed, to enter a protestation at the minute-book, which may be extracted if the pursuer does not call his summons, and get the protestation scored within twenty-four hours after it is made in the minute-book. If protestation is allowed to be extracted no further procedure can be had on the summons; and the defender is entitled to 10*l.* Scots of protestation-money, which he may recover by summary diligence, in which case the value of the extract.

A. S. 26
Feb. 1718.

If the pursuer shall call his summons, but still decline to proceed, the defender may again enter a protestation for not inrolling and insisting; which, if not attended to, may again be extracted, and the protestation-money recovered as before.

A. S. 5 June
1725.

The manner of putting up protestation is this: the agent for the defender lodges with the depute-clerk, whom he wishes to employ, or his assistant, a note expressive of the protestation wanted, with the names and designations of the pursuer and defender, and the names of the defender's advocate and agent thus: "Protⁿ. for not calling and inrolling A. against B. the

"sum-

A sum-

" summons dated and signeted in the month
 " August last or since, Per C——. D. Agent

To which the depute-clerk, or his assistant
 subjoins the date, and the mark of the office
 which is always the initial letters of the firm name
 of the two principal clerks, and the depute
 thus :

" 12 Nov. 1790, Protestation,

" M. M. B.

This note the clerk then delivers to the keeper
 of the minute-book, who inserts the substance
 of it among the other proceedings of Court, that
 it may come to the knowledge of the pursuer
 or his agent; the keeper receiving a fee of one
 shilling for his trouble.

A. S. 9th
 Aug. 1776.

It has been already said that protestation may
 be got scored, upon producing the summons
 with a calling upon it. It may likewise be
 scored by producing the summons to show that
 the days of comparance are not elapsed; before
 which time the pursuer is not bound to proceed.
 But if in one or other of these ways the pro-
 testation is not scored in due time, the keeper of
 the minute-book will give out a warrant for ex-
 tract; which he does by returning the before-
 mentioned note, on which he puts a marking for
 this purpose: " Edinburgh, 1st December, 1790
 " Given out to be extracted,

E.

His fee for giving out this warrant, or for
 giving the protestation on production of the
 summons, is one shilling.

This warrant, with a copy of the summons,
 then put into the hands of an extractor, who
 gives out an extract, on which diligence may
 proceed for the protestation-money, as before
 directed.

If the summons shall have been duly called
 by the clerk, but no protestation is put up with-
 in a year from the date of the calling, the pro-
 cess is said to fall asleep, and a summons of wa-
 king becomes necessary; which summons
 being executed against the original pursuer, and
 the days of citation elapsed, protestation may
 then be put up, for not insisting in the principal
 cause, in the same manner as before directed,
 mentioning only that it is "protestation on a
 waking."

Where no protestation is necessary, and the
 pursuer means to bring forward the cause on ex-
 piring of the *inducia*, the first thing to be done
 is to table the summons, providing it contain
 no diets; if it contains only one diet, tabling is
 necessary.

Tabling of summonses was ordained by the St. 1537.
 instituting the College of Justice, that the c. 44.
 causes might be called and decided in the order
 of a table or roll, to be made up according to
 the

St. 1672.
c. 16. § 1.

the date of such tabling or presenting. The date was ascertained by the clerk marking upon the back of the summons; for which he was paid him. This order of calling summons was taken away by the act of regulations 1672, which ordained that all processess should be executed according as the parties are in readiness: but the form of tabling is still continued on account of the clerk's fee.

The summons being presented to the clerk collector, with 2s. 9d. $\frac{1}{3}$, the ordinary dues, he marks it on the back thus:

" 12 Nov. 1790, tabling paid,"

" E."

after which he returns it immediately to the person by whom it was presented.

The agent then writes, on the margin of the first page of the summons, a note for calling, bearing the lawyer's and agent's names, the name or title of the summons, with the names and designations of the pursuer and defender, after this manner: " Call, *per* Mr. A. advocate, B. agent, summons of declarator, C. against D. When there are more than six defenders, to the above note, or *partibus*, as it is called, run thus: " Call *per* Mr. A. advocate, B. agent, summons of declarator, C. against D. and others, as *per* roll." This roll referred to, is in the same words with the *partibus*, only substituting

joining

ing. The names and designations of all the
 marking defenders.
 which a The summons, together with the roll of de-
 summon ders names, when they exceed six in number,
 ions 16 e then given in to the depute-clerk or his
 uld be d stant, who carries them to the court; and in
 e in rea e morning, at nine o'clock, now usually on
 continu Thursday and Saturday, before the Ordinaries
 the cler come to the outer-house, he reads aloud, at the
 y dues, ce-bar, the *partibus* and roll of the defenders
 mes.

It is the business of the advocates clerks then
 id," attend, and to cause the clerk of process
 " E." mark the name of such lawyer as may be re-
 ely to t ned for the defender; for which purpose the
 fender's agent must previously furnish the
 vocate's clerk with a note of the parties, that
 gin of t may have the action in view, at the time of
 calling e callings.
 the nar

Appearance being thus marked for the de-
 der, af der, the clerk completes the *partibus* in this
 vocate, manner :

" 13th November, 1790.

" Act. A. alt. F. To see—agent G.

M.M.B.

and he puts the same marking on the roll of
 e defenders names, where such roll is necessary.
 fter which he delivers all back to the agent
 om whom they were received; and a copy of

G

the

the roll, with the clerk's marking, is made and affixed on the walls of the outer-hall when the ſummons is put to the roll, in manner after mentioned.

When there are ſeveral defenders, ſeveral advocates may be employed, which often happens in actions againſt debtors; in which caſe the advocate for the party principally concerned or otherwiſe the eldeſt on the faculty liſt, is intitled to get out the proceſs to ſee, and the clerk makes out the *partibus* in this way: "A^ct. A. alt. F. for M. to ſee, and to acquaint "H. for L." and ſo on.

If at the calling, appearance ſhall be entered for none of the defenders, then the *partibus* ſhall be made thus:

"13th November, 1790.

"A^ct. A. alt. abſent; To the roll.

M.M.B.

If, by any oversight, the ſummons ſhall be allowed to go in abſence, while a lawyer has been truly retained for the defender, the clerk will amend the *partibus*, upon immediate application, thus, "Thereafter appeared F. for the defender, to ſee; G. agent.

M.M.B."

Though this calling is not in preſence of the judge, and the appearance is entered only by an advocate's clerk, in his maſter's name, yet

held to be a judicial step of procedure, which makes a depending action, that, though allowed to lie over, may be awakened at any time within the years of prescription. And the calling being duly made, it cannot be repeated.

A.S. 26
Feb. 1718.

Where the defender makes no appearance, the summons may be inrolled in the next week's regulation-roll.

A.S. regul.
1695. § 21.

But, when appearance is regularly made, the advocate for the defender is intitled to have refusal of the summons and writs founded on, in order to prepare himself upon the cause. On this head it is enacted, "That when a summons is called, and given out to be seen, there shall be given out therewith an inventory of the writings founded upon by the pursuer, so far as the same are in his power, which inventory shall be signed by his advocate; and the writings therein specified shall either be given out with the summons and inventory, or lodged with the clerk of the process, at or before the time of outgiving, that the defender may have an opportunity to borrow up and see the same, before preparing his defences."

A.S. 11
Aug. 1787.
§ 5.

The form of giving out the process is this; a short minute is made on the back of the summons, which is signed by the pursuer's advocate, to this purpose: "Edinburgh, 13th No-

“ vember, 1790. Given out this summons
 “ with execution thereof subjoined, and with
 “ founded on, as *per* inventory, to Mr. F. to see

If at the calling by the clerk an advocate has been, by mistake, marked for the defender who is not retained by him, he immediately on getting the process, makes a return, in these terms: “ Edinburgh, 13th November, 1790.
 “ Seen and returned as not for the defender.”

In consequence of this return the summons must go to the regulation-roll, and not to the roll of ordinary actions, as it would have done had appearance truly been made for the defender; in order to which it must be previously carried back to the clerk who called it, who subjoins, to the advocate's return, a marking, in these words: “ In respect of the above return
 “ not for the party, To the regulation-roll.
 After which the summons may immediately be put in the regulation-roll accordingly.

But when the advocate, to whom the process is given out, has been properly marked for the defender, he must return the process, with defences, within six days after the outgiving, with a minute subscribed by him, on the back of the summons, in these words: “ Seen and
 “ returned with defences apart.”

With regard to these defences, the late act *federant* before quoted is very explicit. It

St. 1672.

c. 16. § 20.

summons that, "When the defender returns the
 and with summons, he shall therewith return, upon a
 F. to see separate paper, his whole defences, both di-
 advocatory and peremptory, stating the facts he is
 defende to insist upon, and explicitly admitting or de-
 immediately saying the several facts set forth in the pur-
 n, in the pursuer's libel, and shall, along with his defences,
 er, 1790 return an inventory of the writings founded
 defender." upon by him, so far as the same are in his
 summons power, which inventory shall be signed by
 prior to the his advocate; and the writings therein spe-
 have done cified shall be given to the advocate for the
 or the de pursuer, or lodged with the clerk to the pro-
 previously cess, at or before returning the summons,
 and it, with the defences, that the pursuer may have
 working, an opportunity to borrow up, and see the
 return same, before the calling of the cause; and if
 tion-roll the defender shall fail to return defences with
 liately b the summons, or to produce the writings
 founded on by him as aforesaid, or if he shall
 the pro afterwards state any new defences, or pro-
 marked for duce any writings unduly kept up by him,
 cess, with which he might have stated and produced at
 utgiving the time of returning the summons, the Lord
 the back Ordinary shall immediately award to the pur-
 Seen and suer, the expence which he has incurred by
 the delay."

ate act of This act of *federunt* does not derogate from a
 e. It omer one, which declares, that, "if by reason
 dain
 " of
 A. S. 11
 Aug. 1787.
 § 5.
 A. S. 1st
 Jan. 1726.
 § 5
 19
 Feb. 1742.

“ of new difcovery, the defender be obliged
 “ alter any part of his answers or defences, the
 “ he give in that alteration in writing, forth
 “ eight hours at leaft before hearing; and,
 “ that cafe, fhall be obliged to pay thirty fh
 “ lings fterling at leaft of cofts, to the purfue
 “ And in the fame manner, if the purfuer
 “ obliged to amend any part of his libel, he fh
 “ likewise give in the amendment in writin
 “ fo as the defender may have opportunity
 “ fee it forty-eight hours before hearing; and
 “ fhall pay the forefaid fum at leaft of cofts
 “ the defender: and that the giving in of f
 “ amendments and alterations, whether up
 “ libel or defences, be intimated by the cler
 “ in the outer-houfe, at the intimation of t
 “ bills; and that the intimation be marked
 “ the clerk on the back of the amendment.”

The latter part of this act, regarding intim
 tion, has gone into difufe. The fame may
 faid as to the exaction of the thirty fhillings
 cofts; which is to be regretted, as defende
 have often nothing in view but to protract t
 caufe, by giving in their defences piece-meal.

St. 1672.

c. 16. § 21.

When there are more defenders than one, the
 advocate to whom the fummons is given ou
 fhall return the procefs in four days, which fh
 lie in the clerk's hands for fix days thereafter
 during which time, any advocate appearing f

another

obliged to the other defender, may see the process in the clerk's hands, and borrow up the same for the space of twenty-four hours. These other defenders are also ordained to give in their defences and the vouchers thereof, within these days. But in practice much irregularity and trouble is occasioned by this last part of the act not being duly attended to.

A. S. 15.
Feb. 1723.

In order to prevent the undue keeping up of processes, after expiry of the six days allowed for seeing them, the act of regulations 1672, authorised the ordinary on the bills to fine the advocate in 3*l*. Scots for each day the process is detained after requisition by a notary, and before complaint is made by the pursuer; and 6*l*. Scots for each day it is detained after the complaint is given in: one half of which fines are to be paid to the pursuer, the other to be put to the poor's box. But the most effectual remedy is that in present use; which is, for the Lord Ordinary on the bills to grant warrant to the clerks, upon complaint of the pursuer, for apprehending and incarcerating the party who delays the process, till such time as he return it, and also pay the macer for his trouble.

St. 1672.
c. 16. § 20.

A. S. 11
Nov. 1691.

To prevent any undue preference of one cause over another, the judges are directed to proceed according to the order in which the causes are enrolled; for which purpose books of enrolment are

St. 1672.
c. 16. § 1.

are ordered to be kept both for the inner and outer-house.

St. 1672.
c. 16. § 2.

Ib. § 3.

Two of these books are appointed to be kept for the outer-house; in one of which are to be inserted suspensions, advocations, removingejections, and recent spuilzies. This is called the *suspension-roll*, and is called upon Tuesday and Wednesday. But by the present practice it is confined to suspensions and advocations removingejections, and spuilzies being included in the roll of ordinary actions.

The other book is appointed to contain a roll of all other outer-house causes, which are therefore called the *ordinary action-roll*. It is divided into two parts. In the first part are placed summonses where no comparance is made for the defender, and processes of reduction remitted from the inner-house upon warrants to discuss. This part of the roll goes commonly under the name of the *regulation-roll*. The latter part necessarily comprehends all actions not included in the *suspension* or *regulation-roll*; and therefore to it exclusively the name of *ordinary action-roll* is usually applied.

Ib. § 3.

This roll is, by the said act of regulations, appointed to be called on Thursday and the remaining days of the week. But the practice is to call the first part of it, to wit, the *regulation-roll*, upon Wednesday, immediately after the

suspension

the inner suspension-roll is finished. The latter part of it, containing the *ordinary actions*, is called on Thursday and the following days. The keeper of these rolls attends in the session-house each Saturday, during the session, from twelve to two o'clock, for the purpose of receiving inrolments: and when Saturday happens to be a vacant day, the rolls are taken up on the Friday preceding. He attends also for the same purpose upon the last Saturday of the Christmas vacation. A. S. 26
Jan. 1768.
— 24 Dec.
1763.

The method of inrolment is by giving in the commons to the keeper of the rolls, with a slip of paper, bearing a note in writing, which varies in some trifling degree, according to the nature of the cause to be inrolled; but the general tendency of it is to show the nature of the proceedings, who is the clerk to it, the names of the parties, and the advocates and agents who conduct it. Thus the note given in for inrolling an advocacy is in this form:

Suspension-roll.

K. Advocacy, A. against B.

Per C. et D.

E. and F. agents.

The inrolment of a suspension will be in the same terms; only after the clerk's mark K. the word *suspension* will be substituted in place of

of *advocation*. If either of them have been executed as a summons, and called in absence, the note will bear accordingly *suspension in absence* *advocation in absence*," &c. with the names of the advocate and agent for the advocator only; but in such case it is necessary that the absent party be specially designed, a circumstance otherwise not required; the bare mention of the parties' surnames being sufficient where appearance has been made.

This remark is equally applicable to inrolments in the *regulation* or *ordinary action-roll*, which vary from the above form only in the name of the particular roll, and in mentioning the nature of the action, as "summons of declarator," "summons of wrongous imprisonment," "summons of spuilzie," and so on, as the case may be.

The note of inrolment and summons being produced to the keeper, he marks the date of inrolling on the summons, which he then returns to the in-giver, keeping the note, in order to enable him to insert the cause in the proper book of inrolment: and it is his duty, on the Monday thereafter, to affix on the wall of the outer-house a roll of the causes, according to the order of the book, which are to be heard that week.

A.S. 9 July
1789.

This roll is, by a late regulation, ordered to be printed, in consideration whereof, and of furnishing

fishing the practitioners with copies, the fee of
rollment is augmented to 2*s.* sterling; besides
which, the person inrolling pays one penny to
the house-keeper, or servant attending; and no
higher fee can be demanded for inrolments
made on the last days of the session, which was
the practice formerly.

The suspension-roll, and roll of ordinary ac-
tions, in the outer-house, cannot be called on
any of the last nine federunt days of the winter
session, or last seven federunt days of the sum-
mer session; but the regulation-roll is called du-
ring all these days.

Process for payment of ministers' stipend, pro-
cesses of wrongous imprisonment, and process
against inferior judges, who neglect to execute
the laws for preservation of the fishing, are en-
titled to summary dispatch, without abiding the
course of the roll.

A.S. 25
Feb. 1723.
§ 3.

— 19 Feb.
1742.

St. 1695.
c. 27.

— 1700.
c. 6.

— 1705.
c. 2.

CHAP. II.

Ordinary process in the outer-house.

SECTION I.

Proceedings before an interlocutor is pronounced

WHEN the cause is called before the Lord Ordinary in the outer-house, it is the duty of the advocates for the parties to be ready to debate, and the agent for the pursuer must previously have lodged the process in the clerk's hands, with all the writings founded on. If the defender is absent, the pursuer is entitled to proceed in the cause, and to get decree immediately, in case his libel be proved; but if a process is requisite, a term will be assigned for proving accordingly: and the defender cannot be reponed against such decree or interlocutor, but upon payment of 10*s.* at least, or such greater sum as the Lord Ordinary may think proper to multiply. And in case of his being cited as within Scotland, and allowing decree to be pronounced in absence, he cannot be reponed without paying an amand of 20*s.*

A. A. 20
Nov. 1711.
§ 5.

— 11 Aug.
1787. § 6.

— 20 Nov.
1711. § 5.

If the pursuer be not ready, the process shall be deleted out of the roll, to be again inrolled in

inary form ; but if the defender appear, and demand protestation for not insisting, it shall be instantly granted, and the protestation shall not be recalled but upon payment of 10s. at least, before. This is called a *judicial protestation*; and the effect of it, when once extracted, is to exonerate the defender from that *instance*, after which he is not obliged to answer till he be cited upon a new summons, and the protestation-money paid.

If the absence of the advocate for either party be necessarily occasioned by his attending in the other-house, when the cause is called, the Lord Ordinary is required, by the act of regulations, St. 1672. c. 16. § 10. to call the cause next day, if desired by the party.

The practice is, to call such causes the next day, after finishing the rest of the roll, if the Lord Ordinary have time for doing so; otherwise they are called next day, agreeably to the act.

If the parties be in the view of making up the cause in an amicable manner, or see it for the interest of both that it be not immediately proceeded in, the Lord Ordinary will, on a motion from the bar, make *avisandum* with the process. This interlocutor making *avisandum* in general terms, is not understood to send the process to the Lord Ordinary, for his advising; neither does it hinder the parties from inrolling

rolling and proceeding in the cause, whenever they please, or their agents from borrowing the process from the clerk, when they have occasion for it: all which stands otherwise when *avifandum* is made with any debate or particular paper in the cause.

A. S. 20
Jan. 1643.
— 2 June
1675.

— 1 Jan.
1726. § 5.
— 19
Feb. 1742.

From the acts of *federunt* we before cite when treating of the preliminaries of process, might be inferred that an amendment of a libel was to be admitted, *in initio litis* only; and that it must be proponed before a calling of the cause. For the sake of regularity and dispatch it were to be wished that this could always be done; but to avoid the trouble, expense and delay that would necessarily be occasioned, by bringing a new action, these amendments are in practice frequently allowed, although not given out to the other party to be seen, forty-eight hours before the calling, in terms of the act of *federunt*: nay sometimes they are admitted after several steps are taken. This however, seems to be clear, that if a cause shall be carried the length of *litiscontestation*, by proof being allowed, an act extracted, and set forth, no amendment of the libel is competent and the remedy left to the pursuer is to bring a supplementary action, which may be remitted to and conjoined with the action already in court.

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When any amendment is wanted, the way to obtain it is, to give in a note in writing, at a calling of the cause, specifying the amendment required. This note the Lord Ordinary allows the other party to see till next calling. If the party has any objections to propone against the amendment being allowed, he is heard thereon; when the Lord Ordinary will either refuse to admit the amendment, or will allow it to be received, as he sees fit; after which the parties proceed to the merits of the cause.

When both parties come prepared to debate, the advocate for the pursuer first proceeds to state his libel, and the grounds upon which it proceeds; and the defender next propones his defences or exceptions, in their proper order.

These are either dilatory or peremptory. The nature and effect of a dilatory defence is only to delay and defer the action; that of a peremptory defence, to extinguish it completely, and operate a perpetual absolutor in favour of the defender.

Of the first sort, therefore, are, all exceptions,

1. To the pursuer's title,
2. To the form of the action,
3. To the form of citation,
4. To the competency of the court,
5. To the particular judge before whom the cause is brought;

and

When

and others of the like nature. The two mentioned are, strictly speaking, to be still *declinatory* defences, rather than *dilatory*.

A.S. II
Aug. 1777.
§ 5.

It was already observed that, at the return of process, all defences both dilatory and peremptory must be proponed; a regulation exceedingly proper, as the parties are thereby enabled to proceed and debate upon the peremptory defences, in case the dilatory defences shall be over-ruled. But if, on the other hand, dilatory defences shall appear to the judge to be of such a nature as to merit an absolver in favour of the defender, the Lord Ordinary will give judgment accordingly, without obliging the parties to debate the peremptory defence proponed.

In every case the defender must take care to proceed to his peremptory defences without at the same time stating such dilatory defences as he means to insist on; because his doing otherwise will be held as passing from all defences of dilatory nature.

After the advocate for the defender shall have stated fully his defences, the advocate for the pursuer is heard in answer; to which the defender, is intitled to reply; and if the Lord Ordinary find it necessary, the debate proceeds by duplies, triplies, and so on, till the argument on the point at issue be completely

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at so as the defender may always be the last
speaker, if he insist upon it.
If there be more than one advocate for a
party, the *junior* advocate opens the debate, by
stating the grounds of action, and the defences
proponed by the *junior* lawyer on the other
side; then the *senior* advocate for the pursuer
answers, after which the *senior* lawyer for the
defender replies, and in this way the debate
proceeds, as before mentioned; the eldest ad-
vocate for any party always pleading after his
seniors.

The view in making the regulations before
noticed, with regard to giving in full defences,
and amendments either of defences or of the
plea, was to bring the merits of the cause, as
early as possible, before the Lord Ordinary, in
the first stage of the proceedings. With the
same view, it is provided that all writings, not
formerly produced, shall be lodged in the clerk's
hands twenty-four hours at least before the call-
ing of the cause; and the particular clauses
shall be marked on which parties intend to
insist. It is likewise ordained that all allega-
tions shall be proponed at least before any re-
ply or application to the Lords in presence;
with certification that no new allegation or de-
fence shall be heard, unless it shall have come
recently to the knowledge of the party; and

A. S. 1 Jan.
1726.
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wherever that is alleged, it shall be instructed by oath; and in any event the proposer shall pay a fine to the other party, for his expenses to be modified as the court may see cause.

A. S. 20
Nov. 1711.
§ 17.

By the same act it is further appointed that where an allegation is offered to be proved *scripto*, the pursuer or defender who is possessed of the writings shall instantly produce them, and if he shall allow a term to be assigned, or diligence to be granted for recovering writings in his own possession, he shall pay a fine to the other party, not under forty shillings sterling to be modified at the pleasure of the judge.

Though generally no person is obliged to defend an action, unless specially cited thereto, yet, as it sometimes happens that all parties having interest in the issue are not called, they are intitled, on getting notice that such cause is commenced, to compare and oppose the pursuer's plea, if they so incline. In order to this, however, they must instantly verify the interest they have in the cause, by productions made to the clerk's hands. These the pursuer is allowed to see, and parties will be ordained to be ready to debate against next calling. This is called *a compareance incidenter*, or *a compareance for one's interest*.

If parties shall be fully heard at the first calling, and the facts all ascertained, the Lord

Ordinary

the instructions of the Lord Ordinary will immediately pronounce judgment; if there appear to him any difficulty in the case, he will take the matter to more deliberate consideration with himself: this is called *avisandum to the Lord Ordinary*; which the clerk of the process accordingly minutes under the date; and pursuant thereto the Ordinary considers the pleadings usually for several days, after which he either pronounces judgment himself, or by reason of the difficulty of the case, he declares he will take the opinion of the whole Lords, in which case the cause is said to be *taken to report*. The Lord Ordinary often takes the cause to report without previously making *avisandum* therewith to himself, either when he sees difficulty at the time of the pleadings, or when the point at issue is of great importance.

But if the process be not ripe for a decision, by reason that the facts are not ascertained, all that the Lord Ordinary can do, is to determine the relevancy; that is to say, supposing the matter of fact libelled by the pursuer, or opposed and insisted on by the defender to be proven, he determines how far it would infer the conclusions which they respectively draw; in which case the judge is said to find the libel or the defences proposed relevant, and in so far as they are so, he admits them to probation.

tion. The parties then must condescend upon the manner in which they will undertake to prove their averments, which they may do according to the nature of the case, either by the oath of the adversary, by writ, or by witnesses. The procedure, in consequence of adopting one or other of these modes of probation, makes the subject of the third section.

St. 1429.
c. 125.

To prevent false and groundless averments what is called an *oath of calumny*, was very early introduced into practice; whereby the one party is intitled to demand of the other, that he make oath that the facts set forth by him in the libel or the defences are just and true; and the effect of it is, to bar the swearer from insisting on those parts of his libel or defences which he himself shall on oath acknowledge to be groundless. But as this is an oath, not of verity, but of credulity only, the party who demands it is not understood to make a final reference to the oath of his adversary, so as to preclude him from bringing any probation as to the fact sworn to; and therefore, whatever the tenor of that oath may be, the allegation may be proved in the same way as if no oath were given; and may even afterwards be referred to the oath of verity of him who previously swore *de calumnia*. For this reason a party is not bound to give oath of calumny on a recent fact of his own, as that

A. S. 13
Jan. 1692.

must

ascend upon it resolve into an oath of verity; and it
undertake should be unjust that one party should be bound
may swear on the verity, while the other is not
, either bound to abide by it. And, on similar prin-
or by which it will be denied, in particular actions,
consequence such as deforcement, *ne detur occasio perjurio*; Dict. Dec.
of probable reduction and improbation, before the writs vol. 2. p. 12.
section. called for be produced, for there the allegation
averment the pursuer is only to force production effec-
very early; nor will it be allowed, when appearing
one party be demanded with any view of delaying the
, that he is.

him in the Not only the parties, but their advocates also,
; and they be compelled to give their oath of calumny,
a insisting this effect, that they have just reason to insist
which be the libel, or to propone the defence, accord-
grounding to the information received from their
verity, but ents, and that they believe the information
mands be true. It may be craved in any stage of
ference to the cause, before decree is pronounced, though
clude him generally it is demanded *in initio litis*. The
fact sworn party, if present, may be compelled instantly to
r of that year; and if absent, he may be brought to
proved in the oath in court, in virtue of a writ filed a
ren; and diligence, the nature of which will be after-
e oath of words treated of.

calumnia. These oaths have gone much into disuse, since
give oath the act of *federunt* 1715, which obliges a party, A.S. 1 Feb.
, as that without making oath, to confess or deny any 1715. § 6.
must fact

fact or averment pleaded against him, otherwise holds him as confessed, and subjects him in his expenses to the other party, if it shall turn out that he has denied it falsely.

St. 1672.
c. 16. § 14.

If the cause, after the first calling in the outer-house, remain in such a shape that no definitive sentence can be given in it, then the Lord Ordinary will make such interlocutory order as the circumstances of the case may require, and, if necessary, he will, upon a future day, hear the cause at the side-bar. And it is a general rule that, when a cause has been once fixed before the Lord Ordinary, it shall remain before him until it be discussed, either by an act of litiscontestatio, a protestation, or a decree. If the Lord Ordinary die during the dependence, the proceedings stop, until a new Ordinary be named by the Lords, on the petition of either party concerned: after which the cause proceeds, by hearing, at the side-bar, or otherwise, as it would have done before the former Ordinary.

In order to understand the times and the manner of proceeding at the side-bars, where by far the greatest part of the business of the court is conducted, it is necessary to remark, that a few causes are determined at the first hearing before the Lord Ordinary in the outer-house, and it becomes absolutely necessary that stated time be appointed for hearings and other after-proceedings.

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edings; and as it unavoidably happens that a multitude of causes remain before each of the Lords, long after their sitting in the outer-house Ordinaries for the week, it becomes a very difficult matter to regulate the business in such a manner as the Lords may have proper opportunities to dispatch the processes depending before them respectively, and at same time a due degree of order and regularity be preserved. These difficulties have obliged the court to adopt various regulations at various times.

By the rules at present observed, the Lord Ordinary, who has been in the outer-house for the week, is intitled to sit and hear causes in the outer-house, from nine to ten o'clock, on Tuesday, in the week following. He may also, every session day of that week, Saturday excepted, repair to a side-bar, at the rising of the Lords, there to hear causes till two o'clock; and on the Saturday, he may sit there from nine o'clock, till the inner-house rises. He may, every session day, Tuesday excepted, of the third week, after his own, sit in the outer-house, from the time the single bills are over, and he shall not be called into the inner-house, except it be necessary through the want of a quorum.

The other Lords sit also by rotation, three at a time, at three different benches, every session day,

A. S. 6 June

1733.
— 5 June

1734.
— 11 Aug.
1787. § 7.

— 11 Mar

1788.
— 5 June

1790.

— 6 June

1733.
— 5 June

1734.

day, from nine to ten o'clock, for the purpose of hearing causes which have not been discussed during their sitting as Ordinaries in the outer-house, and at the times above mentioned; the order of rotation being according to their seniority on the bench. During the two last *federunt* days of the summer session, and four *federunt* days of the winter session, no judge is intitled to sit in the outer-house, except for calling acts and regulations.

A. S. 15
Feb. 1723.
— 6 June
1733.
— 24 July
1744.

In order that the practitioners may have due notice of the particular times when the respective judges are to come to the side-bars, the keeper of the outer-house rolls is ordered to affix on the wall of the outer-house, each Monday morning, a note of the particular days, hours, and names of the Lords who are to hear causes at the side-bars for that week. The same note also intimates the names of the judges who are to officiate during the week as Ordinary in the outer-house, Ordinary on the bills, on oaths and witnesses, and on concluded causes respectively: as to which judges, the rule of their succeeding to act in these different capacities, is this, that the Lord Ordinary shall be upon concluded causes, who was Ordinary in the outer-house the week immediately preceding, and the two Lords immediately before him in seniority, or in other words, the two Lords who were Ordinaries

— 11 Nov.
1708.

— 5 June
1711.

the outer-house, immediately before him, shall be upon oaths and witnesses.

This note of intimation, therefore, is always made up after the following form :

Dec.	Outer-house and bills, Lord Eskgrove,		
90.	Oaths and witnesses, Monboddo, Ankerville,		
	Concluded causes, Justice Clerk,		
Justd.	Justice Clerk,	Ellick,	Stonefield,
Ed.	Gardenstone,	Hailes,	Monboddo,
Justd.	Ankerville,	Eskgrove,	Swinton,
Justd.	Henderland,	Rockville,	Dunfinane,
Justd.	Justice Clerk,	Dreghorn,	Alva,

Lord Monboddo comes to the outer-house on Wednesday and following days ;

and Lord Justice Clerk continues in it all Saturday forenoon.

This intimation appears evidently defective, when compared with the late regulations of court, already noticed, in so far as it overlooks altogether the judge, who may sit every session-day, Saturday excepted, from the rising of the courts till two o'clock, the first week after being ordinary in the outer-house.

It is obvious, from the circumstance of three judges all deciding in different causes at the same time, who must be attended by the same body of practitioners and men of business, whether advocates, agents, or clerks, that much confusion and delay must arise in the proceedings.

ings. If it might not be deemed improper to suggest a remedy, after the many excellent regulations which, within these few years, have been made by the judges, with the view to obtain regularity and dispatch, we should perhaps be inclined to refer to the practice of the court

A.S. 4 Nov.
1686.

a century ago; when one judge only was allowed to sit in the outer-house at a time. On the supposition that if the increase of business shall not admit of only one judge sitting, it is submitted that matters would be very considerably mended, if two and no more were admitted; on which footing an arrangement might be brought about, were the inner-house to meet at eleven, in place of ten; a circumstance which appears to be necessary to the proposed plan, and would cause, it is hoped, no inconvenience to the judges.

But to return to the business in hand; when it is necessary to bring a cause before the Lord Ordinary at the side-bar, it must be inrolled in what is called his hand-roll. This roll is made

— 11 Nov.
1708.
— 25 Nov.
1738.

up by his Lordship's private clerk, who subscribes it, after putting upon it a short minute docquet, specifying the number of causes it contains, in order that no addition be unduly made. The roll, so subscribed, must then be affixed on the walls of the outer-house by twelve o'clock noon, two days before that on which the roll is to be called; and the hand-roll of causes to be

— 11 Aug.
1787. § 9.

called

properly called on Tuesday must be put up at twelve
o'clock noon of the Saturday preceding. The
processes so inrolled must be lodged in the clerk's
hands by six o'clock of the day preceding that
on which the roll is to be called, under an amand
of 10s. sterling.

The inrolment consists of a short note, men-
tioning the mark of the clerk to the process, the
names of the parties, and of their advocates;
to which some of the judges, with great proprie-
ty, require to be added, the particular purpose
for which the inrolment is made. These things
the agent mentions verbally to the Ordinary's
clerk, who attends in the outer-house from ten
o'clock of the day on which the roll
is affixed on the walls, for the purpose of making
it up. Or the inrollment may be made with
greater accuracy, by lodging with him a note in
writing, which will be to this purpose: *100 s wol*

"K. Burnet against Bruce, *per. D. et E.*
To force in condescendence;" or, "To get in
answers to condescendence;" and so on: for
which inrolment the Ordinary's clerk is enti-
tled to a fee of three shillings.

A.S. 1 Aug.
1789.

When a cause is first called before the Lord
Ordinary in the outer-house, which has any ma-
terial connection with another process already in
court, this last is held to be the leading process,

to which the Lord Ordinary will remit the subsequent cause *ob contingentiam*.

The only effect of this remit is, to bring the two actions before the same Ordinary. The processes remain perfectly distinct; they may have different clerks, even in different offices, and procedure being held in one of them will not prevent the other from sleeping. But the connection between the two is so intimate that the Lord Ordinary, to whom they are remitted, sees ground for conjoining them, then they become one process, to which he is clerk who was clerk to the leading process; and the acts and decrees therein, which it may be necessary afterwards to extract, will be burdened with the libel, productions and pleadings applicable to both. On which account chiefly the counsel and agent should consider well, before they allow a conjoining of actions.

Sometimes a party is reduced to the necessity of combating his adversary's plea, by alledging falsehood and forgery in the writings founded on, and offering to improve them as such. If this improbation is proponed in a late stage of the cause, unless there appear pregnant circumstances to induce a suspicion of falsehood, the objection will be repelled as incompetent *bono statu*, reserving to the party objecting to insist

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an ordinary action of improbation as accords.
 if proponed in due time, the judge will ad-
 the objection as competent, and allow the
 to propone improbation *per modum excep-*
 is, and sist procedure in the principal action,
 the reasons of improbation are discussed. In
 er to which the proposer of the improbation
 But it confign 40*l*. Scots in the hands of the clerk
 the process, to be forfeited to the other party
 the allegation shall turn out to be calumnious;
 he who founds on the deed challenged must
 le by it, for doing which a day is assigned to
 parties. After confignation and abiding
 the deed, great avifandum is made to the
 ds, and the cause proceeds as in an ordinary
 on of reduction and improbation.

all interlocutors and sentences must be sub-
 ed by the judge; and by act of *federunt*
 e in absence must be signed the same day
 are pronounced; those upon debate with-
 x days thereafter at farthest, excepting in-
 ocutors pronounced on the four days pre-
 ng the two last days of the session, all which
 t be signed within forty-eight hours after
 ouncing; and interlocutors given on these
 last days, which must be subscribed the
 day they are pronounced.

When an interlocutor is not signed of the
 e date it is pronounced, the clerk must pre-
 fix

St. 1686.
 c. 3.
 A.S. 9 July
 1709.

fix to the minute the true date of the debate and of pronouncing; and below the interlocutor he must add the date of signing it.

All interlocutors not signed according to the rules prescribed in this act of *federunt* are declared to be void and null.

The same act prohibits interlocutors from being subscribed after the rising of the session.

And it ordains all acts, decrees, and protections to be put up in the minute-book of the date they are signed.

A. S. 10
Nov. 1741.

If in writing out an interlocutor, any mistake shall be committed, the judge will allow it to be amended, on consent of the parties.

SECTION II.

Of Representations.

IF both parties acquiesce in the judgment pronounced by the Lord Ordinary, the point decided becomes final, and the decree, if the interlocutor be such as warrants a decree, may be extracted. When a party is dissatisfied, he must present a representation to the Lord Ordinary, praying an alteration of the judgment. This he must do within ten *federunt* days of signing the interlocutor complained of, otherwise it becomes final, unless he shall alledge he has co-

A.S. 4 Nov.
1686.

— 15 Feb.
1723. § 2.

— 19 Feb.
1742.

the knowledge of some material fact that he
interlocutors do not before know; which allegation he must
prove.

In reckoning the *federunt* days in the outer-
house, Saturday is included. In petitions to the
house, it, in general, is not (a).

But if a party is to represent, it is the business
of his agent to borrow up the process from the
court immediately; for, if the other party insists
on it, he is intitled to extract the decree,
after elapsing of four and twenty hours from its
being read in the minute-book.

Representations against decrees entirely in ab-
sence may be preferred at any time before extract.

Antiently it was usual to stop extract, by
verbal order of the judge. This was after-
wards discharged, and all stops were ordained to
be in writing, and subjoined to a representation,
bearing the same. These stops are also declared
to endure above a fortnight, when granted in
time of session, and to endure only until elapse
of the first eight days from the sitting down of
the session, if granted in time of vacation, unless
they are renewed.

The signing of interlocutors in time of vacance
is discharged very soon after making the
above enactment, the last part of the regulation

(a) See part 1. ch. 3. § 1.

has

A. S. 20
Jan. 1671.
— 7 Nov.
1690.

A. S. 11
Nov. 1708.

A. S. 9 July
1709.

has long been useless; and the clause which permits the endurance of stops has also become obsolete.

The representation, together with the process must be lodged within ten *sederunt* days, and should regularly be put into the hands of the clerk of process; although a practice has crept in, of transfixing representations to the judges by the hands of their private clerks; which, besides the irregularity of the measure, is attended with this disadvantage to the agent, that he cannot get his receipt for the process deleted from the clerk till such time as it be returned from the Lord Ordinary; consequently he remains during that period, which is at times very considerable, liable to any hazard attending it.

A.S. 1st
Aug. 1789.

The clerk of process receives one shilling for every representation, and the Ordinary's private clerk is entitled to three shillings.

— 6 Feb.
1748.

The Lord Ordinary, on reading the representation, will either ordain the same to be answered by the other party in writing, or *viva voce* at the bar: either of which deliverances will keep the matter open until a new interlocutor is pronounced; or his Lordship will refuse the desire of the representation, after which the matter remains open, so as no extract can go out till three days after the decree on the refused representation is put up in the minute-book. And

the party representer may offer a second representation to the Lord Ordinary within ten *federunt* days of the date of signing the last interlocutor, provided no extract has previously gone out; to the event which the process should be borrowed from the clerk immediately on the representation being refused.

If the representation be ordered to be answered at the bar, it is the business of the other party to inroll the cause in the Ordinary's first hand; and if the representer shall not come forward at the calling, his representation will be refused, in respect he does not appear to support the same. If appearance is made for him, then the counsel debate on the merits of the representation, and the Lord Ordinary, after hearing them, will pronounce his judgment.

But if the order be simply to answer the representation, which is the most usual deliverance, the other party must give in a written answer, within the time limited by the interlocutor. This answer, and whole process, is lodged in the hands of the clerk to the process, who transmits it to the Lord Ordinary, without the necessity of any calling or *avisandum* being made. The fee for which is one shilling to the clerk of process, and three shillings to the private clerk of the Lord Ordinary.

A. S. 1st
Aug. 1789.

L

When

When the Ordinary has considered the pleadings at the bar, in the first case, or the written pleadings, in the latter, he will pronounce an interlocutor refusing the desire of the representation, in whole or in part, and in so far adheres to his former judgment; or, if he see cause, he will alter his first judgment, and pronounce a different interlocutor. After which, the party who thinks himself aggrieved, may again appeal to the Lord Ordinary, by a representation within the time before mentioned.

A.S. 10
Aug. 1774.

These representations are not limited in number; so that a party who conceives himself hurt by the Ordinary's judgment, frequently brings an intolerable load of expence on the litigants, and trouble on all concerned. To prevent which the Lord Ordinary may declare, in his interlocutor, that he will receive no more representations in the cause; after which, and farther representations, though presented, will not stop the running of the days fixed for re-presenting to him, or for reclaiming to the Lords, unless received and written on by his Lordship.

— 6 Feb.
1748.

On the refusal of every representation, the decree represented against must again be immediately put in the minute-book; and it may be extracted after three days from its being

it up, unless the process be taken up from the
work and a new representation lodged, in man-
ner before mentioned.

SECTION III.

Of acts of litiscontestation and incident diligence.

A PROCESS, or *lis*, was, in the civil law, said to
be contested, or litiscontestation to be made,
when the pursuer had preferred his claim, and
the defender his defences; and this was con-
sidered as a judicial *quasi* contract entered into
between the litigants, by which they agreed to
submit the cause to the decision of the judge.

By the usage of our courts, litiscontestation
can only be formed by extracting an act or war-
rant, granting a proof of special facts to either
party, or to both.

Formerly these warrants were never issued
till the court had previously sustained the facts
alleged as sufficient to infer the conclusions
drawn from them; but by the later practice
they are commonly granted, before ascertain-
ing the relevancy, and they are extended to all
facts and circumstances which either party may
think it necessary to prove, in order to throw
light upon the cause.

The warrants of the first sort, granted after determining the relevancy, are, in the more proper sense, called *acts of litiscontestation*; those of the last kind, though they infer litiscontestation, when that term is taken in a larger sense, are called *acts before answer*. Litiscontestation may, by our practice, also be formed by the pursuer's taking a term to prove his libel, even in absence of the defender, which is styled *litiscontestation reo absente*, or *parte non comparente*.

The different modes by which a party may prove his averments are by the oath of his adversary, by writ, or by witnesses, according to the nature and circumstances of the case.

Before resorting to any of these, it was already observed that it is competent to him to insist that his opponent, who refuses to admit the facts alleged, shall confess or deny the truth of them. This the judge ordains him to do, either judicially in court, or by a writing under his hand, or sometimes only by the mouth of his advocate, according to circumstances and the nature of the facts averred. If he refuse to answer, he is held as confess, and judgment is pronounced accordingly; but if he denies any fact which shall afterwards be proved to have been known to him, he must pay the full expenses which the other party has incurred by the denial.

A. S. 1 Feb.
1715. § 6.

If the probation is by writings which are in the possession of the party who founds upon them; then, he may immediately produce them in process, and thereby prove his averments. The opposite party, if the writs are in his possession, is bound also instantly to produce them; otherwise, if he shall occasion assigning of terms, or wanting diligences for recovery thereof, he is liable to his opponent in such fine as the Lord Ordinary shall modify, not under 40*s*.

When probation, in any other shape, becomes necessary, the Lord Ordinary pronounces an act authorising it, and assigning a term within which the writings must be recovered and the proof taken. This act is obtained either on a motion from the bar, or on a demand being made in a representation for the party, an answer, or such other paper as the stage of the cause requires. The act is accompanied by a diligence or warrant for citing those who are to oppose in the probation. It may be represented against like any other interlocutor; but if allowed to grow final, it is extracted and signed by one of the principal clerks; after which the Lord Ordinary can proceed no further in the cause, without a special warrant from the Lords. The act must be put up in the minute book of the date it is signed.

A. S. 20th
Nov. 1711.
§ 17.

— 9 July
1709.

Formerly

Formerly all probation was taken before the Lords themselves; but, by the present practice they usually grant warrant for taking it on commission. This, besides the commissioner's name, mentions when and where the proof is to be taken, and the day against which it must be reported, which is always the term assigned in the act.

When those who are to depone reside at a distance, the commissioner named is generally the sheriff-depute of the county, or any of his Majesty's justices of the peace. Sometimes the commission is granted to the clerk of the process, or his assistant: and the diligence which accompanies the act for proving contains always a warrant for summoning before the commissioner, those who are to depone, whither advocates, havers of writings, witnesses who are to give parole evidence, or parties to whose oaths reference is made.

Where the party who is to depone attends in court, his evidence may be taken, without extracting a commission, by obtaining a written warrant on the process, from the Lord Ordinary called a remit, which may be to the clerk of process, or his assistant, or any other member of court. Otherwise it is necessary that the commission be extracted.

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The act being extracted, it is the business of the party who obtains it, or his agent, to cause the diligence against those who are to depone; and timeously to put the extracted act and commission into the hands of the commissioners appointed for taking the proof.

With regard, however, to probation by the oath of party, the procedure differs somewhat from that which is observed in other cases; and varies also according to the manner in which the reference is made. If made by the defender, an act must be extracted, as before mentioned, but there is no necessity for citing the pursuer to appear and depone, he being understood to be as much in court as he could be after any citation, and therefore his advocate must take a day for him to appear and depone; and failing his deposing, he will be held as confessed, and the point referred will be considered sufficiently proven.

If the reference is made by the pursuer, specially in the summons, with certification that if the defender fail to appear and depone, he will be held as confessed, then his counsel is bound to take a day for him to appear and depone, on which an act will fall to be extracted, but it is not necessary that any citation be given, providing the defender was summoned *personally* to appear in the action, or has appeared and proposed

poned peremptory defences. But if the citation given him on the summons was not *personal* and he has not compeared to propone defence in the cause, then an act must be extracted and citation given thereon, in manner before explained.

St. 1686.
c. 10.

In every reference to the oath of a defender where nothing is to be proven on his part, the pursuer is bound to furnish him with an extracted act, within forty-eight hours after being required thereto, otherwise the defender shall be dismissed, providing such requisition be made after elapsing of the term assigned for proving and before circumduction, at the pursuer's instance.

The proof being led, and the term which was assigned for proving expired, the party delivers the same, with the act and commission, to the clerk of process, who puts it into the roll of his acts, a copy of which roll is affixed on the walls of the outer-house, for information to those concerned, the day previous to the calling. The act is called on Wednesday or Friday morning, at ten o'clock, not before the Lord Ordinary, who was originally judge in the cause, for he ceased to be Ordinary in it, on pronouncing the act, but before the Lord Ordinary officiating in the outer-house for the time.

When the act is called, the advocate for the party who urges the suit, moves the Lord Ordinary

(b)

ary to make *great avifandum* (b) with the
proof adduced, and circumduce the term for
moving; which his Lordship does accordingly.
But if a party, to whose oath reference has
been made, shall not have compeared to de-
pone, then, at the calling of the act, the advo-
cate for the other party states shortly to the
Lord Ordinary that such a point being referred
to his adversary's oath, a day was taken, or a
citation was given to appear and depone on
such a day, which being elapsed, and the de-
fender having failed to depone, he therefore
states that he may be held as confessed, and
the term circumduced against him. If the
party then come forward, ready to depone, his
oath will still be received. Or if his counsel re-
ferent any reasonable cause of absence, and
not having previously deponed, offering still
to depone within a certain short time, the Lord
Ordinary will circumduce the term and discern,
perfering extract till a future day, betwixt
which he allows the oath to be received.
In such case the party may still depone, within
the time limited, as if the act had not been
called; but if he fail to do so, the decree of
circumduction may be extracted, and therein
is holden as confessed.

(b) *Avifandum* to the whole Lords.

M

If

A.S. 1 Feb.
1715. § 8.

If a prorogation is required by the party, will be obtained, on application to the whole Lords, good reasons being assigned and verified; but the party who asks it must pay to the other party the damage and expenses occasioned by the prorogation, to be modified by the Court.

St. 1686.
c. 10.

If, on the other hand, the oath required of a defender, who has nothing to prove on his part, and his not deponing has been occasioned by the pursuer's refusing to furnish him with an act, in terms of the statute before quoted, then that falls to be stated by the defender or his counsel, and it is a good ground not only for preventing circumduction, but for his being dismissed, in terms of the statute.

The manner of obtaining such dismissal is by requiring the pursuer, under form of instrument, to furnish the act, protesting at same time that, if he does not, the defender shall be free from the instance. This instrument is lodged with the clerk of process, who thereupon causes the act to be called, when the defender states his willingness to depone. If the pursuer absent himself, or refuse to furnish the act, within twenty-four hours thereafter, the defender appears before the Ordinary on oaths and witnesses, who, after considering the matter, dismisses him accordingly; the effect of which is that circumduction cannot thereafter pass against him.

party, till he be cited of new to appear and de-
the whole one.

verified This procedure, however, rarely takes place,
the other the more effectual way, when the pursuer
sioned by thus in a manner deserts the cause, is for the
e Court, defender himself to extract the act, and depone,
required after which he is intitled to prosecute the action
to prom to a final decree.

has been If witnesses, cited to give evidence, either on
to furnish parole testimony, or by production of writings,
te before have failed to appear, the execution of the dili-
y the de gence against them is reported to the Lordordi-
ground ary, at calling the act; in which case his
a, but for Lordship will delay circumduction, and grant a
tute. second diligence against the witnesses and havers

missal formerly cited. This second diligence is of the
of instr nature of a caption, and contains a warrant to
at same messengers to apprehend such witnesses and
r shall havers, and bring them before the judge or
ument commissioner, in order to be examined.

hereupon The term of this second diligence being
defende elapsed, the act may again be called, when the
e pursu party will obtain great *avisandum*, with the
act, with proof adduced, and circumduction *quoad ultra*;
defende which concludes the proceedings in the outer-
and wi house.

utter, di If, on expiry of this second term, no proof
which be still adduced, the Lord Ordinary circum-
s again duces the term, and pronounces decree.

Againſt theſe interlocutors of the Lord Ordinary, no defence or representation to his Lordſhip is competent, he having no power to judge of the merits of the cauſe. If the party, therefore, whom the judgment affects, has any reaſon to aſſign why the proof has not been taken and reported, he muſt ſeek redreſs by a reclaiming bill to the whole Lords, who will either add here to the judgment of the Lord Ordinary, or renew the act and commiſſion, as they ſee cauſe.

But if the act granted for proving was an *act before answer*, circumduction being made, no decree can be extracted thereon; great *aviſandum* is neceſſary, becauſe the relevancy not being determined in the act, it remains to be done by the Lords in preſence; for which reaſon the Lord Ordinary circumduces the term againſt the party, and makes great *aviſandum* with the former debate.

When the proof to be taken goes only to determine certain points in diſpute, without exhausting the principal cauſe, or when the cauſe at iſſue is but of leſſer moment, the Lord Ordinary is deemed a competent judge of the probation to be taken, without ſending the cauſe to the inner-houſe; for which purpoſe he grants warrant for taking the proof upon an incidental diligence to be reported to himſelf: granting a commiſſion at the ſame time, and a ſecond dil-

gence

ord Ordice afterwards, against witnesses and havers,
his Lord necessary, as in the case where an act is ex-
to judge fted.

y, then The proof being taken in this manner, the
any re he is inrolled in his Lordship's hand-roll,
en take en he will circumduce the term for proving,
reclaim and make *avisandum* to himself with the proof
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ry, or n y will decide upon it forthwith ; but if there
ee cause ny difficulty, he will order memorials on the
was a of, or pronounce such other interlocutor as
g made case requires : and the cause remains before
; great Lordship until determined, in the same man-
relevan as if no proof had been taken.

ains t incident diligences are also frequently obtain-
r which for recovering particular writings, which may
he term ct the cause, without precluding the party,
avisandum ny shape, from all other probation which
ld be competent to him, were no such dili-
y to de ce applied for. In such case, it is not usual-
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d Ordigh circumduction may certainly be applied
he pro by the other party, if he who has obtained
cause to diligence shall appear to have taken it with
e grants view of delaying the cause.

incident parties and their counsel are entitled to be St. 1686.
nting a ent when the witnesses are examined, and c. 18.
nd dili ee the depositions in the clerk's hands, and
gence copies thereof before advising.

At

At fuch examination they may offer all relevant objections againft the witneffes; which, if instantly verified, the judge will immediately decide upon, if the proof is taken before him, and reject or admit the witnefs as he fees cause. When the proof is led upon commiffion, the commiffioner takes down the objection, and allows the witnefs to be examined; leaving it to the court to judge what weight the testimony is intitled to. If the objection made is not instantly verified, it is no bar to the examination, however relevant; but the party objecting may proteft for reprobator: that is, proteft that the objection may be allowed afterwards to bring evidence to fupport the objection in a proper action of reprobator. When proteftation is properly made, the action of reprobator is competent even after a fentence pronounced in the principal caufe, but ufually the decifion is put off till the action of reprobator be difcuffed.

If the commiffioner fhall refufe to take evidence of a witnefs, the party who adduced him may proteft againft the proceeding, and take instruments thereon, which will found him in a petition to the Lords for ftopping circulation, and having a new commiffion allowed.

When a witnefs is under diligence for debt, and is apprehenfive of being taken into cuftody, the Court, upon a petition, will grant him a proteft

Dict. Dec.
vol. 2.
p. 193.

St. 1663.
c. 4.

1681. c. 9.

for all re- in for such time as may be sufficient for his
which, appearing and giving evidence, not exceeding
mediate month; provided the party who requires
before his evidence, or his tutors or curators, if he is a
fees can- nor, shall give their oath of credulity, or sub-
mission, to- scribe a certificate on oath, that the evidence of
on, and- sh witnesses it material in the cause.

aving it- If, after a cause is commenced, either par-
testimony- apprehend there is a danger of losing the
not instar- benefit of a witness's testimony through old age
tion, ho- disease, the Court, upon an application by
cting ma- tion from the party interested, will grant
est that- warrant for taking his evidence, before the ac-
vidence- tion has come the length of litifcontestation;
tion of- and they ordain the oath to be lodged with the
erly ma- rk of process, to lie *in retentis*, to be consider-
even af- along with the rest of the proof, when the
al cau- use comes to be advised by the Court.

the act- A party should consider well his cause before
demand an act for proving; as it is declared
o take- an act of *federunt* that, after acts before answer
o addu- e extracted, no new allegiance shall be pro-
ding, a- ned, which was competent and omitted, when
found b- e act was pronounced; and after the proba-
g circ- on upon the act is closed, no other probation
n allow- any points formerly alledged in the act shall
r debt, a- e admitted.

astody, It is likewise enacted, that where a point is
a prote- ferred to a party's oath, and he extracts his

act
—15 Dec.
1643.
—30 Nov.
1647.

A.S. 23
July 1674.

act for deponing, if the principal process is taken up by the other party, so that the oath cannot be taken, the party taking up the process shall never thereafter be heard to demand the oath, and the Court will give expenses as the case requires.

St. 1686.
c. 10.

When defenders in exhibitions depone negatively, and defenders in forthcomings shall depone, whether *negative* or *affirmative*, the clerk and macers' fees shall be paid by the pursuer.

A party, who makes reference to his adversary's oath, is held to renounce every other mode of probation.

But by adopting a proof by writ or by witnesses, and having a term assigned for proving, neither party is precluded from making reference afterwards to the oath of his adversary. For, on the one hand, the party who is to prove may, after extracting his act, and executing his diligence, still refer the point to the oath of the other party; which reference will effectually prevent circumduction for not proving. And on the other hand, although a party who is admitted to prove his averments, may have extracted his act and cited witnesses, yet still the other party is intitled to make reference to his oath, and prevent the witnesses from being received. Nay, after a proof by writ is taken and found insufficient, and after witnesses are examined,

mined

ained, if they shall depone in such a manner
that the truth cannot be expiscated, either par-
ty may still resort to his adversary's oath. In
all these cases, the reference must be made by
petition to the Lords; seeing, as before-men-
tioned, the Lord Ordinary is exauctorated, on
pronouncing the act for proving.

We shall conclude this subject with mention-
ing the rate of expenses fixed by the Court to
be paid to witnesses cited in a proof, which are,
one shilling a day to each witness for his personal
charges; and to such witnesses as travel on
horseback, an additional sum of one shilling and
pence for each travelling day, and one shil-
ling and two-pence for every day they are de-
tained in court; the number of travelling days
to be ascertained by a reasonable computation,
according to the distance of their place of resi-
dence: and the Ordinaries on oaths and wit-
nesses, or the Lord Ordinary in the cause, if the
witnesses are called on an incident diligence, are
authorised to issue summary warrants against the
agents of the party adducer, for payment of
these charges. Witnesses who are brought into
court by a second diligence have no claim to
expenses.

A. S. 21
Dec. 1765.

C H A P. III.

Proceedings before the Lords in the Inner-house

CAUSES are brought from the outer to the inner-house in one or other of the three following ways :

1. By petition of a party,
2. — Report by the Lord Ordinary,
3. — Great *avisandum* by the Lord Ordinary.

SECTION I.

Of Petitions and Answers.

WHEN a party is dissatisfied with the judgment of the Lord Ordinary, after submitting the matter to his Lordship's review without effect, it is competent to him to lay the case before the whole Lords in a reclaiming petition.

Such petition must be presented within eight *federunt* days after subscribing the interlocutor complained of: in reckoning which, Saturday is excluded, excepting the five last *federunt* days of the session.

It must bear the date when given in, and also mention the date of the interlocutor reclaimed against.

St. 1672.

c. 16. § 15.

A. S. 9 July

1709.

— 1 Feb.

1715. § 3.

— 19 Dec.

1710.

against; and must not contain any allegations in law or in fact, which were not insisted on before the Lord Ordinary, or contained in a representation refused by him; without prejudice to the party urging with new arguments the allegations formerly made.

A.S. 9 July
1709.

Reclaiming petitions, answers, and other papers coming before the inner-house, are printed for the conveniency of the judges; and the better to insure accuracy in the printing of them, the agent is subjected in a fine to the poor of five shillings, or more, as the Court shall find proper, in case of imperfect quotations or typographical errors.

— 15 July
1768.

The printed copies, in order to avoid all solicitation of the judges, are put into boxes appointed for each Lord, which stand in the lobby of the session-house, where boxes are likewise placed for each of the principal clerks, and for the Professor of Scots Law.

— 29 Nov.
1690.

— 2 July
1709.

— 29 Nov.
1765.

The principal written petition must be signed by an advocate; the subscription of the party alone not being sufficient. Within the reclaiming days it should be lodged in the hands of the principal clerk, full and complete, so as to be moved to the Lords during the sitting of the court. In practice, however, this regulation is so often neglected, the paper moved to the Lords seldom having any thing more of a petition

— 5 Mar.
1789.

— 27 Jan.
1747.

tion than the prayer: the drawing of the petition being usually reserved for the printing days immediately to be mentioned.

The principal clerk to a process in the inner house is always one of the two clerks in the office where the process was fixed while in the outer-house.

When the petition cannot conveniently be got printed within the reclaiming days, three days more are allowed for that purpose: nevertheless, the principal petition, or at least the prayer of it, must, within the reclaiming days, be put into the clerk's hands, who moves it to the Lords, by mentioning the name of the petitioner, and of the Lord Ordinary whose judgment is reclaimed against, with the date of pronouncing the same. He then puts a marking on the back of the petition to this effect, "20 Nov. 1790" "moved to the Lords;" to which he subjoins his initials, and the petition is returned to the agent who gave it in.

Act regl.
1695. § 2.

Before giving it in to be moved, the clerk's dues, which are 4*s.* 10*d.* (c) must be paid to their collector, who attends for the purpose in the outer-house every session day, between nine and ten o'clock, and puts a receipt for the same on the margin of the first page of

(c) The fee now demanded has been very lately raised to 5*s.* in consideration, it is said, of the collector receiving it in the parliament-house.

the petition ; and a shilling more is paid at giving in, to the clerk's assistant, or closet keeper.

This moving of the petition, however, will not stop the running of the reclaiming days, nor will the petition so moved be taken notice of in the extracted decree, unless the same is printed and given into the boxes at or before twelve o'clock in the forenoon of the third box day after it has been so moved. And if the petition is moved on any of the four last days of the session, it must be printed and put into the boxes at or before twelve o'clock on the penult day of the session ; or distributed so as the same may be considered by the Lords before the session rises ; otherwise the reclaiming days will run, and execution may go out, which reclaiming days cannot be prorogated, even by consent of the parties.

The *box days* here mentioned are *session days*. The petition being printed in due time, a copy is put into each Lord's box, and also into the box of the principal clerk who is clerk to the process, and of the professor of Scotch law, agreeably to the acts of *federunt* before quoted. And the process must be given in to the principal clerk's office, by four o'clock afternoon, of the same day, at farthest, under a penalty of 100 l. Sterling.

These petitions, which are usually called *single bills*, no answer being yet made to them, are

A. S. 10
Aug. 1774.

— 27 June
1776.

— 23 Nov.
1752.

— 19th
Dec. 1739.

— 25th
July 1741.

A. S. 11th
Aug. 1787.
§ 8.

are taken up by the court, when they meet in the morning, before any other business. In the general case they are considered at the first *federunt*, after being boxed; but those boxed on *Friday* are not taken up till the *Tuesday* following, in order that they may have the benefit of a fuller bench than they could have on *Saturday*, when the Ordinary in the outer-house, for the week preceeding, is intitled to sit in the outer-house, during the sitting of the Court, and petitions against judgments of the inner house, to be afterwards spoken to, are not taken up till the second day after they are boxed.

That all parties concerned may be duly apprised of such petitions being presented, and the order in which they are to be moved to the Lords, a roll of them is put up on the walls of the inner and outer-house, by the Lord President's clerk, at twelve o'clock of the day preceeding, except those to be moved on *Tuesday*, the roll of which is put up at the same hour on the *Saturday* before. No fee is paid for the enrolment; the regulation, though highly conducive to order and dispatch, being very lately introduced, without having obtained any express sanction of the Court.

When the Court sits down, the petition is moved, in its order, by the Lord President, which is done by mentioning the petitioner's name.

...me, the interlocutor he reclaims against, and
 ...the terms of the prayer of his petition; upon
 ...which the Lords deliver their opinions, and the
 ...petition is either refused or ordered to be seen
 ...and answered by the other party.

If it is refused, the petitioner may reclaim to
 ...their Lordships by one other petition, but no
 ...; unless he can allege new matter of fact,
 ...and instruct that it has recently come to his
 ...knowledge. But if he reclaimed from the Or-
 ...nary, on the single ground that he was sub-
 ...red in expenses, or that the other party was
 ...solicited from them, it is not competent to
 ...ing the matter a second time under their
 ...rdship's review.

A. S. 26
 Nov. 1718.

Petitions against interlocutors in presence
 ...ust be presented within six *federunt* days, after
 ...nouncing the interlocutor reclaimed against;
 ...order to which, however, the process should
 ...taken up from the clerk, because, if the
 ...her party insist upon it, he is intitled to ex-
 ...ct the decree, any time after the elapse of
 ...enty-four hours from its being read in the
 ...minute-book.

— 9 July
 1709.

If the first petition, in place of being refused,
 ...ordered to be answered, the court appoints a
 ...me for that purpose, annexing a penalty, com-
 ...only forty shillings, in case the answer be not
 ...dged within the limited time. This penalty,

— 20th
 Jan. 1671.
 — 7 Nov.
 1690.

or

A. S. 14th
June 1788.

or *amand*, as it is commonly called, the Lord have lately declared they will not dispense with if once incurred.

If, however, any thing do occur, affording sufficient excuse for not preparing the answer within the time appointed, the Court will prorogate the term, on an application from the party. This application is made by a written note, stating the circumstances of the case; it is addressed to the Lord President; a copy of it is put into his Lordship's box, and the principal, signed by the advocate in the cause, is put into the box of the clerk to the process, in whose hands the process likewise must be lodged before four o'clock in the afternoon of the day preceding that on which the note is to be moved in court, under a penalty of fifteen shillings.

— 29th
Jan. 1767.

Act regl.
1695. § 2.

When the answers are prepared, they are printed and boxed in the same manner as petitions, and the clerks are intitled to a like fee for them, of four shillings and ten pence; and a shilling more is paid to the clerk's assistant.

A. S. 13th
July 1739.
§ 2.

In order that parties may have notice when the petition and answer is to be advised, the clerk of process is required to mark upon the answers, the date when they were put into his hands, and the keeper of the inner-house rolls is ordered to keep a book of inrolment for reports, and for petitions and answers, and to sign after

the Lord causes therein, as they are presented to him by the parties; or in case two or more are presented at the same time, he is to give them place in the roll according to the date of the ordinary's warrant for inrolling a report, or of the clerk's marking on an answer; for which inrolments the keeper of the rolls is required to attend every session day, between three and four o'clock. His fee, for inrolling each report, for petition and answers, is five shillings; the half of which the party paying the same use, is permitted to demand from the other party, for which summary compulstors, if necessary, will be awarded.

A. S. 13th
July 1739.
§ 3.

In practice, the answers are seldom put into the clerk's hands till the cause appear in the roll, and a day is fixed for advising; the inrolment being made without regard to any such competition as the act of *federunt* had in view. The practice also is to inrol, in the forenoon, while the Court is sitting, and after the single sittings are over; no attendance being given in the afternoon.

The party wanting the inrolment, who is generally the respondent, carries a printed copy of the petition and answers, and also the principal answer itself, to the keeper of the inner-house rolls, who keeps the printed copies, and the principal paper marks the date of inrolling, after which he returns it to the party.

A. S. 10th
Nov. 1741.

If any thing shall occur to render necessary an additional petition, or answer, such additional paper may be given in within eight running days from the date of inrolment; after which time they are discharged, unless by special appointment of the Court, under the penalty of 40s. sterling to the poor. A printed petition to the court becomes necessary, therefore, praying for leave to give in any additional paper, after the time limited by this act is expired.

— 1 Feb.
1715. § 4.

When the cause comes to be advised in the course of the roll, and judgment is pronounced by the Court, altering, or adhering, in whole or in part, to the interlocutor of the Lord Ordinary, either party, or both, if they think themselves aggrieved, may again reclaim to the court, unless their ground of complaint regards expenses only, in which case no reclaiming bill is competent.

— 13th
July 1739.
§ 4.

If the Lords, on advising the petition and answers, think the cause attended with difficulty, they will appoint a hearing in presence to take place on a certain day. Whereupon the cause is transferred to another roll, kept by the keeper of the rolls for the inner-house, for cause that, on report or on petitions and answers, are appointed to be heard in presence. And the keeper is ordained to inrol these causes according

g to the date of the deliverance appointing
e hearing.

These hearings are, by act of *federunt* 1711,
pointed to proceed on Tuesday and Wednes-
day; but Tuesday is now appropriated to ano-
ther purpose, by a late regulation, to be imme-
diately noticed; and causes to be heard by spe-
cial appointment, are subjoined to the short roll,
a note mentioning the particular day the
cause is to be heard: with regard to which, the
court are not in use to confine themselves to
the days pointed out by the act.

A. S. 20th
Nov. 1711.
§ 10.

— 11th
Mar. 1788.

Inspection of these rolls is allowed without
reward, and copies are ordered to be put
up, from time to time, on the wall of the inner-
chamber. And from these two rolls the Lord
Chancellor makes up a short roll of such causes
are to be advised by the Court from day to
day.

— 13th
July 1739.
§ 5.

The cause being advised, either upon a hear-
ing, or on the petition and answers, either party
may reclaim, as they may afterwards do in any
subsequent stage of the cause, providing always
that one party prefer only one petition against
judgment in presence, and shall never re-
claim upon the point of expenses merely.

— 26 Nov.
1718.

These petitions against interlocutors in pre-
sence, and answers thereto, are intitled to be put
in the short-roll, without abiding the course of

— 29th
July 1747.

A.S. 13 July
1739. § 6.

the long-roll before mentioned: but the fines are paid for inrolment as if they had entered the long-roll.

— 11 Mar.
1788.

Of these causes where interlocutors of the inner-house are brought under review, a roll is put up on Saturday, to be advised on the Tuesday thereafter; Tuesday in every week being set apart for that purpose.

— 22 July
1743.

If, during the dependence in the inner-house an incident diligence become necessary, it is obtained on application by petition to the Lords. Upon elapsing of the terms thereby assigned whether *avisandum* falls to be made with the proof adduced, or a farther diligence is required the one or other is obtained by a petition to the Court.

When an Ordinary dies during the dependence of a process before him, either party may apply by petition to the Lords, who will appoint a new Ordinary in his stead.

— 20 Nov.
1740.

— 11 Mar.
1766.

Incidental petitions, such as that just now mentioned, which do not complain of any interlocutor, must be intimated to the party having interest, or his agent or advocate in the cause personally, twenty-two hours at least before the diet when such petition shall be moved, by delivering a full copy thereof, with a note indorsed thereon, expressing the time when the petition is to be moved; and there must be entered on

the same principal bill, which goes into the clerk's hands, a note in writing, subscribed by the person who intimates, of the time when, and the person to whom he gave such notice; and a copy of the same note, but not subscribed, must be put upon the principal petition given into the clerk's boxes. The person who gave such intimation must attend at the bar, at the advising, in order to verify the intimation by his own oath, and the oaths of credible witnesses, if necessary.

This act further requires, that if an agent or advocate, to whom intimation is made, shall deny that he is for the party, then such denial shall be mentioned in the note of intimation indorsed on the petition. And unless the person who intimates shall be ready, at moving the petition, to verify that such person is truly agent or advocate for the party concerned, such notice shall not be sustained as legal. And all this is required under a certification that the petition will not otherwise be received; and that the party who gives it in shall be subjected in a fine of five shillings. A like fine of five shillings is, by subsequent act, imposed upon the person who makes the intimation, in case of his failing to attend at the advising, and verify the intimation in the manner before mentioned.

From

A. S. 15
Jan. 1741.

— 30 June
1743.

From the above regulations, however, are excepted all such petitions as require to be kept secret till advised, and also those requiring such dispatch as cannot admit of intimation.

Petitions for sequestrations, or for warrants for payment of money, cannot be received upon any of the five *federunt* days immediately preceding the Christmas vacation; nor after the 20th of February for the winter session, and the 25th of June for the summer session.

A. S. 21
Dec. 1765.

— 17 July

1764.

— 5 June

1790.

SECTION II.

Of Reports.

WHEN a Lord Ordinary finds difficulty in a cause, he generally takes the opinion of the Court upon it; in which case he is said to take the cause to report. The form in which this is done has undergone many changes; but the practice in present observance has been long established by repeated acts of *federunt*.

The Lord Ordinary, who is to report the cause, appoints all parties concerned to put in their informations into the Lords' boxes against a certain day. These informations must be subscribed by an advocate, who is held to be the drawer, and answerable for what they contain.

— 29
June 1738.

— 19 Dec.
1710.

If, at the day appointed, one of the parties give his information in readiness, and the other give not, the Lord Ordinary then authorises him who is ready to print the minutes of debate, and finds the other party liable in the expense thereby incurred. He at the same time appoints a new day, for putting the information which is ready, and the minutes, when printed, into the Lords' boxes, declaring that no information shall be received for the dilatory party, without payment to the other of a fine, not under 40s. sterling; and this interlocutor is joined to the minutes, and must be printed therewith.

A. S. 5 June
1739.
— 13 July
1739.

When both parties are ready with their printed informations, they put them, along with the process, into the hands of the clerk, who, upon intimating the same to the Lord Ordinary, without the necessity of a calling, obtains an interlocutor or warrant for inrolling the same in the inner-house rolls. Where either party is not ready, as before mentioned, the other, who has printed the minutes, lodges the same, with the printed information and process, in the clerk's hands, upon which a like warrant for inrolling is obtained: and in this case the Lord Ordinary will award such summary compulsortory for payment of the expense of printing the minutes, and

and of the fine incurred, as may be awarded for any other incidental expenses.

A. S. 13
July 1739.
§ 3.

— 6 Nov.
1740.

The Lord Ordinary's warrant being shown the keeper of the inner-house rolls, the cause put to the roll appointed for reports, and petitions and answers; he receiving a fee of shillings for the inrolment. The acts of *fed* *runt* before quoted are enforced by a subsequent one, which declares that when the warrant inroll is obtained, the printed informations may be put into the Lords' boxes on the next *federal* day, under a penalty of forty shillings.

If, after taking the cause to report, and before advising it, any material fact or piece of evidence shall be discovered, the party who is found upon it may apply to the Court by petition, stating the circumstances, and praying that he may still be admitted as part of his information.

In such a case the Court usually remits the petition and whole cause to the Lord Ordinary before whom it depended, to do therein as he shall think just. The process is then inrolled in his Lordship's hand-roll, and parties are heard on the import of the evidence so discovered. If it is of such a nature as to do away any difficulty there was before in the cause, then his Lordship may pronounce judgment; but if there still remains difficulty, he will order additional informations to be given in for the parties; or while

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more common, he will make *avisandum* to the Lords with the whole cause, and ordain the parties to print their minutes of debate, and put copies thereof in the Lords' boxes forthwith; after which the cause goes to the inner-house rolls, as above explained.

When the cause comes to be advised in the course of the roll, the Lord Reporter goes to the foot of the clerk's table, and reports the cause to the Court; that is, he states fully the pleas of the parties as laid before him in the outer-house, and in the printed informations before the Court. After which their Lordships deliver their opinions, and judgment is pronounced in the cause; or if they find it attended with difficulty, they will appoint a hearing in presence, or give such other interlocutor as circumstances require.

At reporting the cause, the Ordinary's clerk is intitled to a fee of 3*s.* from each party. A. S. I.
Aug. 1789.

Whatever judgment is pronounced, it is competent for the parties to reclaim against it, in the manner, and under the limitations mentioned in the preceding section.

Causes come often to be reported in the inner-house regularly enough upon printed minutes, without the necessity of formal informations for the parties. — 13th
July 1739.
§ 1.

This is usually the case when incidental applications are made to the Court; such as petitions

tions for the preferable creditors on bankrupt estates, for payment of the preferable sums due to them; petitions for the common agent in ranking, for warrants for money to account of his disbursements. In these and the like applications, the Court not having an opportunity to judge, in so summary a manner, of the facts the petitioners found on, they remit the petition to the judge who is Ordinary in the ranking, Ordinary in the division, and so on, to call and hear the parties, and to report.

When such remit is made, the cause is enrolled in that Ordinary's hand-roll; when the advocate for the petitioner sets forth the grounds of the application, and the remit by the Court, and craves his Lordship to make a report agreeable to the prayer of the petition; to which, if opposition is made, the other party answers, and thereafter the petitioner replies. On hearing this debate, the Lord Ordinary desires the parties to make up minutes thereof, in order to report: which being done, and the minutes lodged in the clerk's hands, an interlocutor is written out, to this effect; "The Lord Ordinary makes *avisandum* to the Lords with the foregoing minutes of debate; and appoints the parties to print the same, and put copies thereof in the Lords' boxes *quamprimum*."

The minutes being printed and boxed, the Lord President orders the cause to the summary-

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(d) See ab

roll, in the course of which it is taken up, and the merits of the application decided.

SECTION III.

Of concluded Causes.

WHEN a proof has been led, and decree of circumduction pronounced (*d*), the *proof*, and in common speech, the *cause* is said to be concluded.

In order to the final discussion of such causes, the keeper of the inner-house rolls is ordered to keep a book of inrolment for them, in which they are to be inrolled according to the date of the conclusion of the cause, as the same shall be presented by the clerk of process. St. 1672. c. 16. § 6.

This regulation not having answered the intended purpose, it was ordained by a subsequent act, that the Lords should name an auditor weekly, for hearing parties on concluded causes, in the order of the roll thereof; who shall make report of the probation in writing, and mark the particular parts of the writs or oaths insisted on, for either party; which report shall lie in the clerk's hands, a week before advising, pursuant to all concerned. The concluded causes St. 1693. c. 17.

(*d*) See above, acts of litiscontestation, ch. 2. § 2.

thus prepared are ordered to be advised by the Lords on Saturdays, and on the afternoons of such other days as the Lords shall appoint.

By the same statute the Court is appointed to advise, summarily, all depositions of parties which shall be marked to be clearly affirmative or negative, by the Lord Examiner.

Act regl.
1695. § 22.

This appointment was afterwards extended to proofs by writ or by witnesses, which should be found to be clear, by the Ordinary on concluded causes: for considering which, and hearing parties thereon, the Lords are appointed to meet weekly, by turns, in the parliament-house from three o'clock to five in the afternoon every Tuesday, Thursday, and Friday.

A. S. 1st
Nov. 1693.

The report made of the proof is called a *statute of the process*. To which, if objections are to be made by any of the parties, they must be lodged within fourteen days after making the report; and the objections and answers thereto shall be considered by the Lord Ordinary, and subjoined to the report; and if parties neglect to lodge their objections, they shall not be heard at advising the cause, without consigning a bond or amand of five dollars; and at advising, no objection shall be made against the act, but against the report, as to the points proven or not proven.

Act regl.
1695. § 19.

The clerk's fee for preparing the cause is directed to be modified by the Lord Ordinary.

not exceeding two dollars at most ; payment of which must be vouched by the collector's receipt in the process, before advising ; each party to pay one half, under certification that the party who shall not have paid his half, when the cause comes to be advised, shall be subjected in payment of the whole.

Act regl.
1696. § 7.

A. S. 20
Nov. 1711.
§ 12.

The manner of preparing states, prescribed by these acts, being attended with considerable litigation and delay, the Court gradually departed from the regulations thereby introduced. By the present practice, when the proof is concluded, the cause is put into the roll of causes to be prepared, and the process and proof taken up into the hands of the inner-house clerk, who makes up the state, without much regard to the points litigated, or the particular parts of the probation which the parties insist on. This state is then signed by the Lord Ordinary appointed for preparing causes, and thereafter inrolled in the roll of concluded causes for the inner-house. But to make up for the want of arrangement in the state, as to the pleas of parties, and the probation which may tend to establish or cut them down, the court is in use to allow the parties to state the import of the probation at large, in mutual memorials. The great trouble which was occasioned by these memorials not being confined to a statement of the proof, but going into all the arguments

A. S. 18
June, 1752.

ments at large, induced their Lordships to make an order, discharging such memorials, and ordering short cases to be made up by each party after the manner of those given in to the House of Lords.

— 15 June,
1774.

The prepared states made up by the clerks affording ground also for complaining that much matter was introduced foreign to the points at issue, a committee of the Lords was named, to consider in what manner a remedy could be applied.

These acts, however, seem to have been but little attended to, as in the latter case, it does not appear that any report ever was made; and the subject of complaint still remains both against the prepared states and the memorials which continue to be given in by parties.

— 12 Nov.
1760.

The roll of concluded causes is ordered to be called on Friday and Saturday. And the *summar* roll to which causes are put, in terms of the regulations 1695, is called on Saturday, except towards the close of the session, when the *summar* roll is called every day.

Act. reg.
1695 § 22.

A. S. 23
July, 1696.

All causes advised summarily, pay the same dues to the keeper of the inner-house rolls, than they would do if put to the ordinary roll of inner-house causes; a roll of which summary causes he is to affix on the walls every week.

— 6 Nov.
1689.

It is enacted that, though concluded causes lie over, there is no necessity for awakening that not having been the practice.

CHAP. IV.

Process Extraordinary.

IN some processes the Lord Ordinary cannot proceed the length of pronouncing judgment on the merits. He can determine on theatory defences only, after which he must make great *avifandum*; the act of regulations St. 1672. c. 16. § 5. requiring that these causes should be advised by the Lords in presence.

The actions particularly mentioned in the statute are,

Reductions of heritable rights of lands and annualrents;

Declarators of rights of property;

Proving of the tenor of writings lost or destroyed;

Ceffiones bonorum;

Actions wherein hearings are ordered by the Lords in presence, upon the report of an Ordinary.

These processes are appointed to be inrolled in a book to be kept for that purpose by the Ibid. § 7. clerk of the inner-house rolls; who is ordered to attend in the session house each Saturday during the session, from two to three in the afternoon, for receiving such inrolments.

And

Act regl.
1695. § 15.

And it was afterwards appointed that if hearing is fixed for a certain day, the cause shall be then peremptorily called; and that roll of such causes shall be made up for that purpose.

With regard to inrolments for the inner house, whether of the above actions or otherwise, the practice, as before noticed, is to make them in the forenoon, while the Court is sitting usually after the single bills are over; attendance being given in the afternoon, in terms of the act. And causes specially appointed to be heard are subjoined to the roll, as already mentioned, by a note, mentioning the particular day the hearing is to take place.

The causes before enumerated, though proper to the inner-house, in so far as regards the decision of them, must yet be introduced by certain steps before the Lord Ordinary. These, with several others, in which the proceedings also differ somewhat from those of ordinary actions, shall be treated of under the head *process extraordinary*; beginning with those which are specially mentioned in the act of regulations.

SECTION

SECTION I.

Of Process of Reduction.

THE intention of this process is to set aside some deed, writ, or proceeding which the pursuer apprehends may be prejudicial to him. In doing which, the difficulty is much greater in some cases than in others.

Thus decrees arbitral, proceeding on a signed submission, cannot be reduced, at the instance of any of the parties submitters, unless on the head of corruption, bribery, or falsehood, to be alleged against the arbiters, by whom the decree is pronounced. Such decree, however, may be reduced, if the arbiters shall exceed the powers granted them by the submission; and a reduction of it has been sustained on the head of fraud in the arbiters. A. & regl. 1695. § 25.

In the action of reduction the pursuer must set forth, specially in his libel, the writs on which he founds his title. But it is not necessary, as formerly, that he call as defenders, the authors of those whose infestments or other writs he means to reduce; it being left to the defenders to cite their authors, or intimate to them their distress, as they see meet.

The preliminary steps, after the process comes to court, are the same as in common actions.

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If the defender make no appearance, the Lord Ordinary will pronounce decree of certification, *contra non producta*; but, if the defender appear, he may defeat the action by producing a title in his own person preferable to that founded on by the pursuer; in which case he is not bound to take a term for producing the writs called for. But if, on the other hand, the pursuer's title is sustained, the defender must either produce the writings called for immediately, or a term will be assigned, usually ten days, for production; after the elapse of which the pursuer may inroll the cause, and obtain a decree, circumducing the term against the defender for not producing.

The writings called for being produced, the cause is inrolled, when the Ordinary makes great *avisandum* to the Lords, and grants circumduction *quoad ultra*.

Act reg.
1695. § 5.

After this interlocutor, the Lord Ordinary can proceed no farther, and the cause must be inrolled in the roll of ordinary actions for the inner-house, in case the reduction wanted is of a heritable right of lands or annual rent, in terms of the act before quoted; but, in place of this the practice is to apply by a petition to the Lord Ordinary, praying a remit to the Lord Ordinary, to discuss the reasons of reduction; which is granted of course; and the cause is remitted to the next

week

week's Ordinary for the outer-house, and is included in the next week's regulation-roll.

But, previous to the application for this writ, if the pursuer finds it necessary to add further reasons of reduction than what are expressed in the libel, he may, within six days

after *avisandum* is made, give in his special reasons of reduction, and grounds of declarator, if A. S. 1st Jan. 1726. § 4.

he has any, in writing, which the defender must answer within six days thereafter, also in writing; and, until the day for giving in these answers elapse, the discussion shall not proceed in the inner-house, neither can any application be made for a warrant to discuss in the outer-house.

By the same act of *federunt* the practice of allowing the defender to see his own production, after calling, is discharged.

With regard to the writs to be produced, if they are recorded in the books of session, they are held to be already in the hands of the clerk of court, and therefore a condescendence of the date of recording, stops certification. But different

opinions are held upon the point, how far an extract from the records of an inferior court, with a condescendence of the date of recording thereof in the books of chancery will be sufficient.

When the principal writing, though recorded, must be produced, a warrant is issued

by the Lord Ordinary for the keeper of the record transmitting it to the clerk of process.

The reductions mentioned in the act of 1672 are those of heritable rights only ; yet it is the general practice, in reductions of decrees, and other writings which do not concern heritage to make great *avisandum* with the production though no act is extracted ; and the reasons of reduction are not decided upon, without a remit from the Lords.

SECTION II.

Of Reduction and Improbation.

THOUGH the process of improbation is not comprehended in the act of regulations 1672 under the actions which are there enumerated as proper to the inner-house, yet, as it is always accompanied by a conclusion of reduction, and has an intimate connection with that process, it falls to be here treated of ; in doing which however, we shall only mention those particulars wherein the form differs from that observed in carrying on a simple reduction, immediately before explained.

A. S. 31st
Jan. 1633.

First, the summons of improbation, as also the bill or warrant thereof, must each have the com-

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of the concurrence of his Majesty's advocate. This is obtained by applying to the substitute keeper of the signet, or the Lord Advocate's clerk, who is generally authorized to adhibit such concurrences, for each of which a fee of 12s. 3d. is payable.

This concurrence the King's advocate cannot refuse; but he is not thereby debarred from appearing for the defender.

The summons in this action always bears that the writings challenged are false, forged, and fabricated; yet the pursuer is not obliged to give his oath of calumny on these averments before production of the writings called for; because the allegation here is understood to be made with the view principally of procuring a full production.

When appearance is made for the defender, he cannot exclude the title of the pursuer, when he must either immediately produce the writings called for, or two different terms will be assigned to him for that purpose; upon each of which an act must be extracted, though in a simple reduction, one term only is required.

After extracting the act for the second term, and before granting certification thereon, it must be enrolled among the other acts, and called before the Lord Ordinary, when judicial intimation is made to the defender still to satisfy the process.

Dict. Dec.
v. 2. p. 12.

St. 1672.
c. 16. § 25.

A. S. 1st
Jan. 1709.

production within ten days; which intimation is vouched by an interlocutor written on the margin of the act, and subscribed by the Lord Ordinary.

Act regl.
1695. § 20.

If at the first calling, in the course of the roll in the outer-house, no appearance be made for the defender, the Lord Ordinary appoints the summons to be again inrolled according to the date of the calling. And if no appearance be made for the defender at the second calling, decree of certification may be immediately pronounced in absence; but in such case the decree must remain unextracted for four weeks at least after it is signed by the Lord Ordinary.

Ersk. b. 4.
t. 1. § 22.

With regard to the writs to be produced, an extract from the books of an inferior judge is not sufficient in this action, though by some it is held to be so in a simple reduction; and even when the deed is recorded in the books of session, or of chancery, the principal itself must be produced, either first, when the pursuer insists upon proper grounds of falsehood; or secondly, if after search in the register-office, the principal writing cannot be there found.

When the defender produces the writs called for, if falsehood is suspected, he must abide by the verity thereof under his hand, otherwise the same shall be held to be forged.

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This abiding by a deed is either simple or *qualificate*. If the defender abides simply by the deed, as a genuine writing, he subjects himself to the pains of forgery if it shall be found false and improven. But as a defender may be circumstanced as to be possessed of a false deed, though he have no knowledge of the forgery; as an heir, for instance, who finds the deed in his ancestor's repositories, or a manager of a public bank, upon whom a forged bill is deposited in the common course of negotiation, therefore the judge allows him to abide *qualificate*; that is, to adject to his declaration a protestation of his own innocence, by a narrative of the way and manner by which the writing came to his hands.

The defender having abidden by the writs produced, the Lord Ordinary makes great *avisandum*, and grants circumduction *quoad ultra*; after which he can proceed no further, and the cause must be inrolled in the roll of ordinary actions for the inner-house.

After such *avisandum*, however, if any further production be necessary, the defender may still make it, any time before decree of certification is extracted; which production must be received by the clerks, and inserted in the extracted decree of certification, without the necessity of any calling, in order to make *avisandum* or to obtain decree of certification anew.

A. S. 1 Jan.
1709.

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When there is no suspicion of forgery and falsehood, abiding by the deed is not required, and application may be made by petition to the Lords for a remit to discuss the reasons in the outer-house, as in a simple reduction. But when forgery and falsehood are suspected, the witnesses and parties are examined by the Lords in presence, and the cause must be determined by the Court.

If a forgery shall be proven, and the Court shall be of opinion that it merits a capital punishment, the Lords remit the cause to the High Court of Justiciary. Lighter punishments, such as banishment or pillory, are inflicted by the Court itself.

A. S. 4 Jan.
1755.

— 8 Aug.
1755.

Cases of forgery, where punishment chiefly in view, may likewise be tried before the Court of Session, on a petition and complaint. The form of procedure in such a case will be afterwards treated of.

SECTION III.

Of Declarators of Property.

NOTWITHSTANDING that the act of regulation 1672 appropriates actions of this nature to the inner-house, yet by the present practice, the

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SECTION IV.

Of Process of proving the Tenor.

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WHEN this process comes to be called be-
fore the Lord Ordinary in the outer-house,
the pursuer produces, along with his libel, what
minicles he can, for instructing the tenor, and
traves the Lord Ordinary to make great *avisan-*
um therewith. This the Ordinary grants of
course, as he has no authority to judge in the
cause; after which the process is inrolled in the
roll of ordinary actions for the inner-house,
where it is advised by the Lords in presence.

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The proof required in this action is of a two-
fold kind, according to the nature of the deed
in question. If the deed was such as it could
be extinguished by simple delivery, without the
necessity of a contrary evident to do it away, it
is incumbent on the pursuer, not only to instruct
the tenor, but also to show by what accident the
deed becomes amissing; otherwise writings
which have been given up to the party in order
to be cancelled, might at any future period be
produced against him as subsisting evidents.

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When

When the deed is of such a nature as to require a contrary written document, in order to its extinction, then it is not necessary for the pursuer to condescend on any special *casus amissionis*, seeing that the writing to be proven must be presumed a subsisting deed, while no document extinguishing it can be produced by the defender.

Thus, according to these rules, where a bill on a personal bond is in question, the pursuer must condescend on the *casus amissionis*; in proving the tenor of an instrument of sasine, such condescendence is nowise requisite.

The interlocutor first pronounced by the Lords either finds that there are no circumstances libelled sufficient to ground the action, and therefore dismisses it accordingly; or it sustains the circumstances founded on, and the adminicles produced, sufficient to support the action. If these circumstances and adminicles are *per se* sufficient to instruct the tenor, and alibi the *casus amissionis*, where that is necessary, then decree may immediately be pronounced in the cause. But if that is not the case, then the Court allows the pursuer to prove the *casus amissionis*, if such proof be necessary, and a further proof of the tenor, assigning a term for taking the proof, and at same time granting diligence for citing witnesses and havers, upon which an

act is extraordinary.

In this case, the Court examined the practice, and that the judges overlooked.

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act is extracted, and a diligence issues out accordingly.

In this action the Court were formerly in use to examine the witnesses in presence; and when that practice was departed from, they required that the proof should be taken before two of the judges; but this strictness has been of late overlooked, and the proof is taken before one Ordinary, as in other cases.

Dict. Dec.
v. 3 p. 443.

The proof being taken, the cause is inrolled in the ordinary action-roll for the inner-house; and the Court, upon a petition from the party, will make *avisandum* with the proof, and grant circumduction; after which the form of proceeding is the same as in other concluded causes.

A. S. 22
July, 1743.

SECTION V.

Of Procefs of Cessio Bonorum.

THE summons in this action, according to act of *federunt*, should specially set forth in what manner the pursuer became *lapsus bonis*; of which he must produce sufficient evidence in the course of the process.

A. S. 1 Dec.
1685.

The practice, however is, to libel the summons in a general manner, and to give into process a special condescendence, afterwards to be taken notice of.

A. S. 1 Dec.
1685.

The summons being called in the outer-house as in an ordinary action, it must be inrolled in the next week's outer-house roll; and a roll of the names of all the defenders who are cited in the process must be put upon the wall. After the dilatory defences are discussed, great *aud* *fundum* is made, and the process is then inrolled in the ordinary action-roll for the inner-house.

— 18th
July 1688.

By an act of *federunt* it is especially required that in every process of *cessio bonorum*, the bankrupt, along with the process, shall produce a certificate, under the hand of one of the magistrates of the burgh where he is incarcerated, bearing that he hath been the space of a month in prison, without which certificate the process is not to be sustained.

St. 1672.
c. 16. § 5.

With regard to this certificate it may not be improper to remark that it is held to be sufficient, very often in practice, that it be produced when the cause comes to be called in the inner-house: but erroneously so, we apprehend; seeing the act 1672 gives the Ordinary full power to determine every dilatory defence, and the act of *federunt*, above quoted, declares that, without production of the certificate, *process shall not be sustained*.

Processes of *cessio* are usually put to the summer roll. This roll is always called on Saturday

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er-house day, except towards the end of the session, when
is called every day.

Before the calling, in the inner-house, there
must be lodged in process an explicit confes-
sion by the pursuer, stating on one hand
the amount of his debts, and on the other his
goods, and the losses he has sustained, in order
that the creditors may be enabled to make a
proper investigation into the true state of his
affairs.

At this calling, it is the business of the ad-
vocate for the pursuer to state the import of the
confession to the court; and if the pur-
suer shall appear to have failed through inno-
cent misfortunes, and no opposition be made on
the part of the creditors, their Lordships will
and the pursuer intitled to the benefit of the
cessio, upon his executing a disposition of his
estate, real and personal, in favour of his credi-
tors, and deponing in terms of the act of *sede-*
vacante.

The debtor then executes a full disposition of
his estate, heritable and moveable, in favour of
the creditors, and subscribes an inventory rela-
tive thereto, of the effects thereby conveyed;
after which, if he be in any neighbouring
prison, he appears before the Lords, on the
Tuesday commonly, at the sitting down of the
court, and, at the foot of the clerk's table, he
makes

A. S. 8 Feb.
1688.

makes oath in the following terms : " That
" hath not any lands, heritages, fums
" money, goods, or gear belonging to him
" more than is contained in the disposition and
" inventory produced in process ; and that
" since his imprisonment, he hath made no
" other disposition than that which is pro-
" duced ; and that he has made no other dis-
" position before his imprisonment ; and that
" since his imprisonment he hath not put out
" of his hands any money, goods, or gear be-
" longing to him. And further that he hath
" not cancelled or put out of his hands any
" writs since his imprisonment."

— 18 July
1691.

If the pursuer shall acknowledge that since
his imprisonment he has cancelled or put away
any writings, he must condescend on such writ-
ings in his oath ; and he must likewise conde-
scend on any other disposition, he may have
made of his estate, real or personal. If he denies
the making of such disposition, and his oath be
redargued, the decree of *cessio* obtained by
him becomes void and null, and he can never
get the benefit of a *cessio bonorum* thereafter.

In case the debtor be imprisoned in a distant
part of the country, he cannot appear to make
oath in court, and therefore their Lordships
upon a motion from the bar, at the time they
find him intitled to the *cessio*, will grant a com-
mission

“That for taking his oath at the place of his confinement.

This commission being reported, or the debtor having appeared and made oath in manner first mentioned, his counsel moves the court to decern in the *cessio* and *dispense with the habit*.

This last part of the motion becomes necessary, as it is prescribed by positive law that

bankrupts who obtain a decree of *cessio bonorum*

shall constantly wear a particular habit; “upon

his head a bonnet, partly of a brown and

partly of a yellow colour, with uppermost

hose, or stockings, on his legs, half brown

and half yellow coloured.” And in case he

is found at any time without the habit, his

creditors may incarcerate him, and he forfeits

the privileges he is intitled to by the decree.

This, however, appears so severe that the

courts now dispense with the habit in all cases

where they find the debtor intitled to the

oath *bono fide*.

If opposition is to be made by the creditors,

it is competent for any one of them before de-

ce, to crave leave to see the process and con-

descendence given in, till next calling. This

the court grants of course; which puts off the

case for eight days, that the creditor appear-

may have time to consider the condescen-

dence and process, and give in his objections.

At

A. S. 26
Feb. 1669.

— 23

Jan. 1673.
St. 1696.

c. 5.

A. S. 18th

July 1688.

At the next calling these objections are stated from the bar, and an answer made on the part of the bankrupt, which the court judges of, and either pronounces an interlocutor finding the pursuer intitled, or not intitled, to the *cessio*; or such other sentence is given as the circumstances of the case may require.

SECTION VI.

Of Process of Adjudication.

ADJUDICATION may well be ranked under *process extraordinary*, from this specialty which attends the procedure, that after one creditor has obtained and extracted a decree of general adjudication, sentence, in terms of the libel, pronounced summarily in every posterior adjudication, in order that all the adjudgers may come in *pari passu*, within year and day, in terms of the act 1661; all defences competent to the debtor, unless instantly verified, being repelled *hoc loco*, though reserved entire to him *contra executionem*.

23 Geo. 3.
c. 18. § 5.

But a still more remarkable specialty, in leading this process, is introduced by the late bankrupt statute, which enacts, that "in order to lessen the number of adjudications, and consequently the expense upon a bankrupt estate

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the Lord Ordinary officiating in the Court of Session, before whom any process of adjudication is called, shall ordain intimation thereof to be made in the minute-book, and on the wall, in order that any other creditors of the common debtor, who may think proper to adjudge his estate, and are in readiness for it, may produce the instructions of their debts, and be conjoined in the decree of adjudication; and a reasonable time, not exceeding twenty *federunt* days, shall be given for that purpose, unless there be any hazard from a delay, which the Court, or the Lord Ordinary, shall judge of."

In following out this enactment, the Lord Ordinary, before whom any process of adjudication comes first to be called, pronounces an interlocutor, ordaining intimation to be made in the minute-book and on the wall, for ten or fourteen days commonly, that the creditors may produce their grounds of debts, in terms of the cause before recited.

This intimation is made on the wall, by the agent for the pursuer affixing thereon a note, expressing the names and designations of the pursuer and defender, and containing a copy of the interlocutor, to which is subjoined the mark of the clerk, in whose office the process lies. It is the province of the clerk of process, and the

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A. S. 9th
Aug. 1776.

keeper of the minute-book, to take care that the intimation by the minute-book be duly given for which the keeper is intitled to a fee of half a crown.

A creditor, who in this way gets notice of any process of adjudication of his debtor's estate being in Court, collects his grounds of debt, and makes up an inventory of them. If he have these in readiness before the term of intimation is expired, and the process is decerned in by the Lord Ordinary, he has only to lodge them in the hands of the clerk to the process, and at the calling of the cause he will be conjoined in course with the original pursuer, and the decree of adjudication will go out for his debt, as well as for the debt specially libelled.

Before lodging the grounds of debt, four shillings and ten-pence, the clerk's dues of *the interest*, as it is called, must be paid to their collector; and one shilling is paid to the clerk's assistant, or closet-keeper.

If decree be pronounced before these grounds of debt and inventory are lodged, then the creditor producing prefers a representation to the Lord Ordinary, stating his grounds of debt, and praying his Lordship to recall the former decree, and to pronounce decree of adjudication of new, conjoining him therein along with the original pursuer.

Upon

Upon such representation decree will be pronounced of new, conjoining the creditor so producing accordingly.

SECTION VII.

Of Process of Count and Reckoning.

THIS action, in its preliminary stages, proceeds like other ordinary actions in the outer-house; with this difference, that it should be entered in the regulation-roll, though by the practice, it is most frequently put in the roll of ordinary actions.

A. S. 22d
Nov. 1711.
§ 1.

At the first calling before the Lord Ordinary, appearance is made for the defender, a day is assigned him, against which he must give in to the clerk of the process a charge against himself, of the whole subjects to be accounted for; with certification, that, if he fail, he shall be holden as confessed upon the charge to be given in by the pursuer, provided the pursuer give his oath of calumny upon such charge.

Ib. § 2.

The defender must also give in with the charge, a copy of his discharge, with the vouchers in his possession; and in each copy he must condescend upon the articles instructed, and their vouchers, and shall also mark the articles not instructed.

Ib. § 3.

A. S. 22d
Nov. 1711.
§ 2. 3.

The accounts, both charge and discharge must be signed by the defender or his procurator; and if any part of the charge be found to be fraudulently omitted or concealed, the defender shall be decerned in the double of what is found to have been so omitted; without prejudice to the other party to add to the charge, and after giving in the accounts, the defender shall not be heard upon any new article of discharge, unless it be made appear that such article has recently come to his knowledge; and in that case, if the defender be in fault, he shall pay a fine to the other party for the expense occasioned by the delay, to be modified by the Lord Ordinary.

ib. § 4.

When the Lord Ordinary assigns a day to the defender for giving in his accounts, he shall at the same time name the Lord who in course is to be Ordinary to the next count and reckoning, to be auditor thereof.

In processes of count and reckoning, the Lords are to officiate by turns, according to the order of their seats on the bench.

ibid. § 5.

After the accounts and vouchers are produced, the Ordinary is authorised to appoint one or more advocates, or other persons of integrity, judgment, and experience, to consider the accounts and vouchers, to state the points in controversy, and to prepare and adjust the

minutes.

minutes, for the ordinary to give his interlocutory upon the whole. These persons are also empowered to call parties and clerks of process before them, and are ordered to sign their report, and to return the same to the clerk of process; where it is ordained to lay for eight days, to be seen by all concerned, without fee or reward; after which, no objection shall be received against the facts as stated in the report, but such as on payment of 20*s.* sterling, or a larger fine, the Ordinary shall please to appoint. This act the Lord Ordinary may renew, if necessary; and the person to whom the remit is made, is to be paid for his trouble as his Lordship shall direct.

This act is declared to extend to all processes which resolve into a count and reckoning, though such accounting is not libelled in the summons. In the present practice, however, the act seems to be little, if at all, attended to. When the cause is called before the Lord Ordinary, a day is assigned for the defender giving in his accounts and vouchers, but without any of the justifications expressed in the act. When these are produced, the cause is, if necessary, referred to an accountant, who, by his profession, is best qualified for such employment. Upon giving in the accountant's report, the Lord Ordinary, at a calling, ordains all parties to

to see and object to it, against a certain day; and if no objections are given in within the time limited, the cause is again inrolled, and his Lordship approves of the report, and pronounces an interlocutor in terms thereof: but if objections are given in, they are ordained to be answered; and the proceedings in the cause thereafter are the same as in ordinary actions.

SECTION VIII.

Of Process of Ranking and Sale of a Bankrupt's Estate.

St. 1681.
c. 17.

THIS action is founded upon an act of Parliament in 1681, which empowers the Lord of Session upon a process at the instance of a creditor having a real right, “ to cognosce and try the value of estates where the heritor is notoriously bankrupt, and the creditors in possession of the estate, and to value the same according to the true worth thereof, in its rents, casualties, rights, and holdings, according to the use and custom of the country where the lands lie; and to commissionate persons to sell these lands and estates, or any part thereof, at the said rates, or more, as can be had for the same, with consent of the debtor, where there is a legal reversion competent

to him; and without his consent, where there is no legal;" and the act declares, that the price which shall be got for the said lands, shall be distribute by the commissioners appointed to sell the lands, or by the purchaser of the same, amongst the creditors, proportionally according to their several sums, rights, and diligences, as they shall be ordered and found preferable by the Lords, whether the creditors have compeared or not."

The above act being rendered in a great measure ineffectual, through the difficulty of procuring the bankrupt's consent, and of getting commissioners who were willing to sell other men's lands, it was improved upon by a subsequent act, in 1690; which declares, that the sale may proceed so soon as it shall be found that the debtor is bankrupt, and utterly insolvent, whether the legal be expired or not; and that the purchaser shall have right to the estate by the decree of sale to be pronounced by the Court; and if no buyer be found at the rate determined by the Lords, that it shall be lawful for them to divide the lands and other subjects among the creditors, according to their several rights and diligences, and to determine the price and value of life-rent escheats affecting the lands.

St. 1690.
c. 20.

The pursuer of this action must, therefore, in terms of the first of these statutes, have a real right

right in the lands, and one of the creditors, at least, must be in possession.

A. S. 23d
Nov. 1711.
§ 1.

The debtor, and all his real creditors, who are in the known actual possession of his lands, by labouring, or uplifting the rents, must be cited in the ordinary form of law; and the bankrupt's other creditors, and all others having or pretending to have interest, must be cited by an edictal citation at the market cross of Edinburgh, pier and shore of Leith, upon sixty and fifteen days for first and second diet. This edictal citation must also be executed *the same day*, at the parish church doors where the lands lie, after divine service, upon twenty one and six days warning; for which several citations, the summons must contain a special warrant. The executions of all these edictal citations must, before the last day of compliance, be recorded in a particular register, kept by the clerks of session for that purpose, otherwise process shall not be sustained.

A. S. 17
Jan. 1756.
§ 12.

Before the act of *federunt* 1756, it was necessary that a summons of sale should contain the particulars of all the heritable estate belonging to the bankrupt, and the omission of any one subject was fatal to the action; but by that act it is ordained, that every summons of ranking and sale, besides the lands and estate specially libelled, shall contain a general clause, mentioning

creditors, and all other lands and heritable estate belonging to the bankrupt, or to which he may succeed as heir to any of his predecessors; and if any such estate shall be discovered, it shall be competent to the pursuer of such process of ranking and sale, during the course of the ranking, to bring a proof of the rental and value of such lands and other heritable estates so discovered, notwithstanding they were not specially libelled: providing always, that upon such discovery, and before granting warrant for a proof of the rental and value of the newly discovered estate, application be made to the Lord Ordinary in the ranking, and he shall grant warrant to notify such estate's being discovered, and that the same is to be sold as part of the bankrupt's estate, by advertisement in the Edinburgh Evening Courant, weekly, for three weeks successively; and upon such notification's being reported to the Lord Ordinary, in manner aforesaid, he shall grant warrant for proving the rental and value of such newly discovered estate, in the same manner as if it had been specially libelled in the original summons of ranking and sale.

This intimation is, by an after act of *federunt*, A. S. 9 Aug. 1783. required to be made in the same manner in the Caledonian Mercury.

After the summons is called, seen, and returned, — 23d Nov. 1711. § 6. it is directed to be inrolled in the regulation-

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roll,

roll, though by the practice it is very frequently inrolled in the roll of ordinary actions.

A. S. 17th
Jan. 1756.
§ 1.

When the process is called by course of the roll, the Lord Ordinary pronounces an act for proving the rental and value of the estate, and the bankruptcy of the debtor; grants a commission for taking such proof, and a diligence for citing witnesses and havers of writings; and assigns a day for the creditors to produce their rights and interests, with certification, as in reduction and improbation: upon all which an act and commission, and a diligence are extracted.

— 24
Feb. 1692.

To prevent collusion in the proof of the rental and value of the estate, any creditor appearing and producing a real right, will be allowed to concur with, and insist in the action along with the pursuer of the sale.

— 17th
Jan. 1756.
§ 1.

— 9 Aug.
1783.

The order on the creditors to produce their rights, and assigning the first term for production, must be inserted in the Edinburgh Evening Courant, and Caledonian Mercury, once every week, for three weeks successively, immediately after the date of the interlocutor; and during the running of that term, the Lord Ordinary may grant first and second diligence against havers of writs, upon application of any of the creditors.

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On the elapse of the first term assigned for ^{A. S. 17th} production, the process is called before the Lord ^{Jan. 1756.} § 2.

Ordinary to the ranking; when he appoints a time and place for a meeting of the creditors who have produced their rights, for choosing an agent to carry on the process of ranking, and the division of the price; and the person chosen by the majority of such creditors present at such meeting, or who shall have lawfully authorised one to vote for them, shall be approved of, and authorised by the Lord Ordinary.

Where the yearly rent of the estate under ^{Ibid.} is 300*l.* sterling, or upwards, such creditors only are intitled to vote in the election of the common agent, whose principal sums, exclusive of interest and penalties, unless accumulated by adjunction, amount to 50*l.*; but where the yearly rent of the estate is under 300*l.* the qualification to vote is extended to every creditor whose principal sum amounts to 30*l.* sterling, exclusive of interest and penalties, as aforesaid.

The common agent must immediately after ^{Ibid. § 3.} his election apply to the Lord Ordinary; and upon such application, his Lordship is directed to assign a second term to the creditors, to produce their claims against the bankrupt, or his estate, with the vouchers thereof, under certification that such writs as shall not be produced shall be held as false and forged, in so far as they

may affect the bankrupt's estate, and the interest of the creditors therein, who have produced or shall produce their rights and diligences affecting the same. The Lord Ordinary is also directed to order notice to be given to all parties concerned, in the Edinburgh Evening Courant, and Caledonian Mercury, as is appointed for the first term: which notification being reported to the Lord Ordinary, a minute is ordered to be made thereon, which shall be held as sufficient evidence of the notice against all parties concerned.

A. S. 9 Aug.
1783.

— 17 Jan.
1756. § 6.

At the same time that the first and second terms are assigned for production, the Lord Ordinary assigns a term for the creditors to depose upon the verity of their respective debts; and grants commission to the Judge Ordinary, or any of his Majesty's justices of the peace for taking the respective creditors' oaths, to be reported at the several diets appointed for production with certification, that no creditor shall be ranked, until he make oath on the verity of his debt.

Ibid. § 4.

Upon elapsing of the second term, the process is called before the Lord Ordinary, who grants certification *contra non producta*, as in an imprecation; but with this condition, that every production made within ten days after the date of the interlocutor, shall be received.

Such

Such productions as are made during that period are received by the clerks, and insert in the decree of certification, without the necessity of any new new calling to make *avisandum* therewith, or to obtain a new decree of certification *contra non producta*.

A.S. 1 Jan.
1709.

After these ten days are expired, the common agent shall cause the decree of certification to be extracted; which decree has the same force and effect in favour of the whole creditors whose interests shall have been produced in the process, so far as concerns the estate under sale, or price thereof, as if they had severally brought a process of reduction and improbation against the whole other creditors upon the bankrupt estate, and had thereupon obtained and extracted a decree of certification, without prejudice to the creditors neglecting to produce their interests, to claim the bankrupt's share of the price, and to use diligence either against him or his other estate, in order to recover payment of their debts.

— 17th
Jan. 1756.
§ 5.

The production in the ranking being closed, the Lord Ordinary assigns a day to the common agent, to make up a state of the interests produced, mentioning the rights and diligences, founded on, the sums claimed by the several creditors, the order of their respective preferences and such objections as occur to him, either to the

Ibid. § 7.

the legality, or to the justice of the claims, to the extent of their debts, or to their preferences, notwithstanding the apparent priority of their security or diligence.

A.S. 17th
Jan. 1756.
§ 8.

After the state of the claims is made up and lodged in the clerk's hands, the cause is put to the roll, and at the calling the Lord Ordinary assigns a day to the common debtor, and to the creditors producing as aforesaid, to make such other objections to the interests produced as they shall think proper, and to lodge them in writing with the clerk of the process against the day so assigned; with certification, that all objections that shall be omitted to be proponed either by the common debtor, or by the common agent, or by the creditors, against the day so assigned, shall be held to be passed from all parties concerned; and it shall not be competent to them, thereafter to propone the same in the course of the ranking, or in the division of the price, unless such objections shall arise from facts newly come to their knowledge.

— 25
Feb. 1779.

— 17 Jan.
1756. § 9.

This last article of the act is enforced by another act of *federunt*, in the 1779.

The objections being given in to the process in manner above directed, the Lord Ordinary assigns a time to the creditors to whose claims objections have been made, for giving in a full answer thereto in writing, and to lodge the same

claims, with the clerk ; and upon their being so lodged, the Lordship appoints a further time to the objectors respectively to reply also in writing, and lodge the same with the clerk of process.

The objections, answers, and replies, being taken in as aforesaid, the Lord Ordinary appoints a day for hearing parties thereon ; after which he pronounces his interlocutor upon the objections, except with respect to such as his Lordship takes to report.

No representation is allowed against the Lord Ordinary's determination of these objections, but the parties may apply for redress, by petition to the Lords.

The Lord Ordinary is directed not to make a report of any objections with which he has made *mandum* to the Lords, until the several objections determined by him shall be either quiesced in by the parties, or stated to the Lords by petition ; and that such petition shall never have been refused, or ordained to be answered : and, when the whole objections remaining undetermined shall be stated to the Lords, they shall appoint a particular diet for discussing the whole together, without abiding the course of the rolls.

All objections being discussed, whether in the inner or the outer-house, the Lord Ordinary appoints the clerk of process to draw up and extend

A. S. 17th
Jan. 1756.
§ 10.

Ibid.

Ibid. § 11.

extend an interlocutor, ranking and preferring the several creditors, according to the order ranking reported by the common agent, and the interlocutors pronounced upon the objections; which interlocutor being extended and subscribed by the Lord Ordinary, the decree ranking is extracted thereupon.

Prior to the 1695, the estate was brought to sale before concluding the ranking of the creditors. In consequence of this mode of procedure, it seems to have been a device frequently fallen upon by purchasers of bankrupt estates to obstruct the ranking of the creditors on affected pretences, whereby they enjoyed the purchases for years often without paying up any part of the price; alledging, that till the ranking was closed, it could not be known which the creditors were entitled to the price, or in what proportions.

Act regl.
1695. § 26.

It was therefore declared, by the act of regulations 1695, that the preference of the creditors should be concluded by an extracted decree at least to the extent of the price set on the lands, before they be actually put up to sale.

But this in reality was not applying a remedy. It was only transferring the power of aggrieving the creditors from the hands of the purchaser to those of the bankrupt; who, though seldom having the same interest as a purchaser to pre-

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astinate the ranking, yet most frequently had
ly as strong an inclination to do so, in order
delay the sale of his estate.

Accordingly, after near a century's experi-
nce, it was found adviseable to return to the
ncient practice of selling the estate before con-
cluding the ranking; regulated, however, in
ch a way, as in a great measure, to prevent
ther purchaser or bankrupt from hurting the
editors. Thus, by the late bankrupt statute,<sup>23 Geo. 3.
c. 18. § 5.</sup> is enacted, "That all actions of sale of lands,
or other heritable subjects, raised, or to be
raised, and pursued at the instance of credit-
ors before the Court of Session, upon any of
the statutes in that behalf made, shall proceed,
and be carried on to a conclusion by actual
sale, as soon as the necessary previous steps of
a sale are taken, whether the ranking of the
creditors is concluded or not; unless the Court,
upon application of the Creditors, or any of
them, shall find sufficient cause to delay the
sale; any law or practice to the contrary not-
withstanding."

And to prevent the subject of complaint
chiefly aimed at by the regulation 1695, it is
urther enacted, "That the Court of Session, on
the application of any of the creditors, shall
be empowered to make an order on the pur-
chaser, to lodge the price and interest at any

“ of the said terms, (e) subsequent to the term
 “ payment, in one or other of the said banks (f)
 “ sufficient intimation being always previous
 “ given, both to the purchaser and to the com
 “ mon agent for the creditors, that such app
 “ cation is made, in order that all parties m
 “ have an opportunity to object.”

According to our present practice, therefore, as regulated by this statute, when the proof of the rent and value of the estate under sale is concluded, great *avifandum* may be made with the proof. This is done by calling the act in the sale, before the Lord Ordinary in the outer house; after which a state is prepared in the same manner as in other concluded causes.

From this state a printed memorial and abstract is made up by the pursuer, and subscribed by his counsel, stating shortly the steps taken in the sale, and shewing the pursuer's title, and the possession of the creditors; subjoining, by way of accompt, on the one hand, the rental with the deductions therefrom, and the proved value of the estate: and on the other, the gross amount of the debts; from which the bankruptcy is inferred, by a comparison made either of the yearly rental with the interest of the

(e) Whitsunday or Martinmas.

(f) Royal Bank, or Bank of Scotland.

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debt, or of the proven value of the estate, with the full amount of the debts proved.

The process being then inrolled in the inner-house rolls, this memorial and abstract must, on the first box day after inrolment, be given into the boxes, for the perusal of the Lords; and the memorial and abstract being moved in Court, the process is remitted to an Ordinary to examine the state, to compare it with the proof advanced, and to report; and upon his report, the interlocutors afterwards pronounced by the Court proceed.

A. S. II
Mar. 1777.

The Lord Ordinary having examined the abstract and made his report, the cause is again put in the inner-house rolls, for advising.

By act of *federunt* the state must be prepared, and the process inrolled and put upon the wall, at least ten *federunt* days before the end of the session, otherwise it cannot be advised till the session ensuing.

— II Mar.
1767.

If the Lords, at advising, shall find that the amount of the debts in the ranking does exceed, or is nearly equal to the proven value of the estate, the Court will ordain the estate to be sold, and letters of publication (g) to be issued, notify-

(g) A letter of publication is a writ in the King's name, and under his signet, signed by a clerk of session, and containing a command to messengers at arms to pass,

notifying the time of the roup, agreeably to the act of parliament 1681.

St. 1681.
c. 17.

The terms of this statute require that the sale be made "by public roup, not being under the rate and price appointed by the Lords of Session; and that the roup be made after public intimation at the market cross of the head borough of the shire where the lands lie, and at the head borough of the bailiery, stewartry, or regality, if they lie within the same; and at the parish-kirk where the lands lie, and at the other parish-kirks (to be named by the Lords of Session), at the dissolving of the congregation, on a Sunday after the forenoon's sermon, by letters of intimation under the signet, upon the Lords' deliverance; which letters shall specially express the time and place of the roup; and the creditors having real rights and possession, shall be specially cited upon twenty-one days, and all other persons concerned, whether within or without the kingdom, at the market cross of the head borough of the shire, stewartry, or regality where the lands lie, and at the market cross of Edinburgh, and pier and shore of Leith, upon sixty days; and a copy of the said intimation shall be affixed

to the pails, and make intimation in the terms therein directed.

ably to the at all the places aforesaid, expressing the lands
to be roup, the price appointed by the Lords
at the fall of Session, and the time and place of the
roup."

Regalities being now abolished, executions A. S. 29th
Feb. 1752.
of the letters of publication must be made at
the market cross of the head borough of the
shire or stewartry within which the lands lie.

Upon the day assigned by the letters of pub-
lication, the estate is put up to roup before
the Lord Ordinary on the bills, according to
the articles of roup made out by the clerk of pro-
cess, and signed by his Lordship; one of which
always is, That the purchasers shall find cau-
tion for the price, to be payable as the Lords
shall direct.

The roup always proceeds in the Parliament-
house, in the afternoon, usually at five or six
o'clock; the Ordinary on the bills then attend-
ing for that purpose.

If no purchaser appear to offer at the roup,
or if, for special reasons suggested to the Lord
Ordinary, it shall appear to him, that a delay
of the sale may be beneficial to all parties con-
cerned, the roup may be adjourned to a future
day by an interlocutor signed by the Lord Or-
dinary; in which case the sale must be again
advertised in the newspapers, and the adjourn-
ment therein specially express.

But

But if offerers appear, and the sale take place then the clerk to the process puts the minutes of roup and preference into the hands of the Lord Ordinary, who, upon an early day thereafter, goes to the foot of the clerk's table, and reports the sale to the Lords, upon which report the Court pronounces a decree of sale, adjudging the estate to belong to the purchaser, upon payment of the price; and remitting to the Lord Ordinary in the sale to order a scheme of division to be made up accordingly.

The scheme of division is made out by an accountant, in consequence of a remit from the Lord Ordinary; which being reported, his Lordship allows all parties having interest to see and lodge objections thereto. After it has remained a reasonable time in the clerk's hands, if no objection be offered to it, the scheme is approved of by the Lord Ordinary, who at the same time pronounces a decree of division, and warrant for the purchaser to pay the price; the extracting of which decree of division concludes the procedure before the Court.

We shall now turn our attention to some incidental steps which may occur in the course of proceeding, but which could not sooner be taken notice of, without interrupting that connected view, which we wished to give, of the ordinary procedure in the ranking and sale.

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If the pursuer die during the dependence, or shall forbear to insist in the process, or if his title and interest shall happen to be satisfied and extinguished, the factor, if there be any appointed by the court, or otherwise any other real creditor, may, upon *special warrant* from the Lords, carry on the process for behoof of the whole creditors. In order to obtain such warrant, it is necessary to apply to the court by petition.

A. S. 23d
Nov. 1711.
§ 4.

If the debtor, or any of the creditors defenders, compearing, and producing their interests, happen to die during the dependence of the process, the Lord Ordinary will grant a diligence for citing the apparent heir of the debtor, or of such defender; and, upon reporting the execution of such diligence, the process shall be proceeded in, without waiting the year of deliberation, or transferring the process *passive*.

ibid. § 5.

By this act, the factor appointed by the court is authorised to raise an adjudication in the name of the whole creditors, according to certain directions in the act; but as this is seldom or never practised, it is unnecessary here to recite the clauses.

ib. § 2.

If any person lawfully summoned, either in common form or edictally, shall suffer the decree of ranking to go out without producing

St. 1695.
c. 6.
A. S. 23d
Nov. 1711,
§ 8.

and

and competing upon his interest, the decree and sale shall stand good notwithstanding and the purchaser shall be bound to pay accordingly; the person failing having no other remedy, but to sue for repetition, from the receivers of the price, and their heirs.

To enable the common agent to proceed in the action, the Court, upon a petition, will grant warrant to the factor, where a factor is appointed, to advance money out of the rents on the agent's receipt and obligation to be accountable. And the agent's account is usually adjusted by the Ordinary, who is appointed to settle the scheme of division.

A. S. 23d
Nov. 1711.
§ 9.

— 10th
Aug. 1754.

Formerly the expense of the action was paid by the creditors, in proportion to their respective dividends of the price; but now it is ordered to be paid out of the price, and only the residue thereof to be divided among the creditors.

23d Geo. 3.
c. 18. § 5.

At any Whitfunday or Martinmas, subsequent to the term of payment, the purchaser may consign the price in the Royal Bank, or the Bank of Scotland, for such interest as can be procured, which consignment being notified to the common agent in the sale, operates a full exoneration and discharge to the purchaser.

SECTION

SECTION IX.

Process of Ranking and Sale at the Instance of an apparent Heir.

THIS process is founded upon the act of parliament 1695, and is carried on in the same manner as the process of sale at the instance of creditors, immediately before treated of; with this exception, that the estate may be sold whether it is bankrupt or not.

St. 1695.
c. 24.

SECTION X.

Process for authorising the Sale of a Pupil's Heritage.

IN order to warrant the sale of any heritable estate belonging to a pupil, it is necessary to have the authority of the Court of Session, by a decree interponed in a proper action brought for that purpose. And most frequently it is thought proper, although not absolutely necessary, to take the same precaution, even in the sale of an estate belonging to a minor *pubes*.

The action is competent even when there is no necessity for a sale, providing it can be shown that the measure is a beneficial one for the pupil;

pil; but it is generally brought when the pupil or minor is burdened with debt, which cannot otherwise be cleared of.

The action proceeds in the name of the pupil with consent of his tutors, and the proper defendant is the person who is entitled to succeed to the estate, failing the pupil. It is unnecessary to call the creditors as defenders.

The summons must specially set forth the whole heritable estate belonging to the pursuer, whether the whole or only part thereof is meant to be included in the warrant of sale; and the extent of his moveable funds must likewise appear, either in the libel, or by a special concordance after the action is brought into Court, in order that the Lords may have a full view of the situation of the pupil's affairs, and be enabled to compare his funds with the amount of his debts, which are ascertained in manner as mentioned, and thereby determine on the necessity or the expediency of the sale proposed.

When the process is called before the Lord Ordinary in the outer-house, an act is pronounced, allowing a proof of the rental and value of the estate, and of the debts due by the pursuer, for which purpose a commission is granted, and letters of diligence for citing the tenants and possessors of the lands, who are to swear to the rental, as well as for recovering the vouchers and

ground

grounds of debt from the creditors, in order to
construct the amount thereof.

The rental and value of the estate being pro-
ved, and the grounds of debt being recovered
from the creditors, the act is called before the
Ordinary in the outer-house, who makes
great *avisandum* therewith; after which the pro-
cedure is the same as in other concluded causes
already treated of.

SECTION XI.

Process of Removing.

THIS process is intituled to summary dispatch, A. S. 14
Dec. 1756.
§ 7.
without abiding the course of any roll. In
every other respect the procedure is the same as
an ordinary action.

SECTION XII.

Process of Multiplepoinding.

THIS process is competent to any one having
in his possession a subject or sum of money,
the property of another, to which different
competitors lay claim, whether as creditors of
the proprietor, or as true proprietors themselves:
and the object of it is to obtain a decree of the
Court,

Court, as a warrant to the pursuer for his paying or delivering up the sum or subject *in medio*, of a fair trial of the rights of the respective competitors.

Such being the nature of the action, it is obvious that it differs from others in this respect, that the pursuer has no interest to prosecute the cause farther than merely to bring all parties concerned fairly into Court; after which the point of right is disputed between the defenders, and the pursuer makes payment or delivery to him in whose favour the decree of preference is ultimately pronounced.

A. S. 1st
Feb. 1677.

The object of this action shows likewise the propriety of allowing it to be *incidenter* repeated in a process of forthcoming, or other action regarding the subject *in medio*, without the necessity of any separate enrolment.

At the first calling an interlocutor is pronounced, finding the raiser of the multiple poinding liable only in once and single payment; and ordaining all parties concerned to produce their rights and interests in the clerk's hands betwix a certain day. When the interests are produced, the cause is inrolled, and on the motion of any of the parties concerned, the Lord Ordinary remits to the clerk of the process, to make up a state of the interests produced, with a scheme of their respective preferences; or, if the

is payin the subject *in medio* be considerable, or the rights
medio, o f parties involved, the remit is made to an ac-
 re compe comptant.

The clerk or accomptant having made up
 their state and report, in terms of the remit, the
 is respect cause is put into the roll, and all parties concern-
 ecute th d are allowed to see and object against a cer-
 all partic ain day. Objections being lodged, answers are
 which th given in by the parties, and when the debate is
 e defend concluded, the Lord Ordinary makes *avisandum*
 r deliver herewith to himself; after which the proce-
 preferenc ure is the same as in ordinary actions.

SECTION XIII.

Division of Commonly.

THE procedure held in this process, while in
 Court, differs not, in any material respect,
 from that observed in ordinary actions. We
 ; and o ke notice of it here chiefly with the view
 duce the shewing how the probation is led, and the di-
 s betwix tion carried on before the commissioners
 s are pro amed for that purpose.

The process is founded upon an act of parlia-
 ment in 1695, which ordains, "That all com-
 monties, excepting the commonities belonging
 to the King, and royal boroughs, that is, all
 that belong to his Majesty in property, or royal
 " boroughs

St. 1695.
 ch. 38.

“ boroughs in burgage, may be divided at the
 “ instance of any having interest, by summons
 “ raised against all persons concerned, before the
 “ Lords of Session; who are hereby impowered
 “ to discuss the relevancy, and to determine
 “ upon the rights and interests of all parties con-
 “ cerned; and to value and divide the same
 “ according to the value of the rights and inter-
 “ rests of the several parties concerned; and to
 “ grant commissions to sheriffs, stewards, bailies
 “ of regalties, and their deputies, or justices of
 “ peace, or others, for perambulating and taking
 “ all other necessary probation; which commis-
 “ sions shall be reported to the said Lords, and the
 “ said processes ultimately determined by them.

By this act the Court is also impowered, either
 to divide moorlands which happen to be in the said
 commonalties, or if such moorlands cannot be conve-
 niently divided, to declare that they shall remain
 common, with free fish and entry thereto, whether
 divided or not.

The interest of the heritors having right in
 the common, is to be estimated according to the
 valuation of their respective properties; next to
 adjacent to which, the share to be allotted to
 each heritor is appointed to be made.

When no sufficient defence is proposed
 either as to the competency of the action, or the
 title of the pursuer, an interlocutor is pronounced

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ed by the Lord Ordinary, sustaining the action, and allowing probation and a division in the following terms :

“ Finds the pursuer intitled to carry on the action, and finds the libel relevant ; and grants commission to to visit and perambulate, and to take cognizance of the several limits and marches of the commonly or muir libelled ; and to take all necessary probation thereanent, by the oaths of such habile witnesses as shall be adduced by the parties for ascertaining the limits and extent of the said commonly, and the possession of the respective parties therein, and extent and endurance of such possessions, and of any interruptions that may have been made by the parties to one another's possessions, and for what rooms or lands such possessions have been had ; and ordains extracts of the valuation of the lands so possessed to be produced before the commissioners ; and likewise to take trial and cognition by the oaths of such witnesses as shall be adduced by the parties, of the different qualities of the ground ; and to cause measure the said whole commonly, and every parcel thereof, as the same shall be distinguished for its different qualities ; and for that end to call to their assistance persons skilled in measuring ground, and to cause them, upon
“ oath,

"oath, to make out a scheme or map of the said
whole commony in its quantity, and of every
parcel thereof, as it shall be distinguished by its
different qualities : and thereafter to proceed
to divide the said ground among the parties
having interest therein, and that according to
the valued rents of the several lands, as parcels
and pertinents whereof they possess the com-
mony ; and that in the appointment of the
shares, each heritor's part shall be set off to
him, so as it may be nearest and most con-
venient to his property-lands ; and to put up
set march-stones for dividing each heritor's
proportion from the other ; as also to divid-
ing within the said common muir, among the
said heritors : but in case it shall be intrus-
ed to the commissioners, that the said moss
cannot be conveniently divided, to cause leave
the same still common, with free fish and entr-
thereto ; and that upon the ground of the said
commony, or any place in the neighbourhoo-
thereof, as shall appear most convenient to the
commissioners, any of the lawful day or days
betwixt and the next to come
and assigns the said day
next for reporting the same
and grants diligence at the instance of the
parties, pursuers and defenders, for citing
witnesses and havers, to compare before

the commissioners to the effect foresaid; and ordains the commissioners in the division to have a due regard to the houses and property-lands of the several parties having interest; and in order that no party intitled to a share in the said division may be excluded therefrom, authorises the clerk to receive such interests as may be produced before extract; as also appoints the commissioners to receive such interests as shall be produced before them, though not produced in the extract; and to admit the parties so producing to a share in the said division, according to their several rights, interests, and possessions, in the same manner as is above described."

When this commission is reported, the act is sealed, and great *avifandum* made with the proof of the said division, after which a state is prepared; and the form of proceeding afterwards is the same as in other concluded causes.

SECTION XIV.

Division of Runrig Lands.

THIS action is founded on the statute 1695, St. 1695. c. 23. which ordains, That wherever lands of different heritors lie run-rig, excepting borough and incorporate acres, it shall be compe-

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tent

tent to any heritor concerned to apply to have the same divided according to their respective interests. This division is appointed to be carried on before the sheriffs, stewarts, or justices of peace of the several shires where the lands lie; but the process is usually brought before the Session, when the subject to be divided is of any value.

The form of proceeding is the same as in the division of commonry, only in making the division the act requires that the judges have special regard to the mansion-houses of the respective heritors, and do adjudge to them in the division such parts as shall be most commodious to the respective mansion-houses and policy: and the act and commission granted by the Lord Ordinary for that purpose, is qualified accordingly.

SECTION XV.

Process by Petition, and by Petition and Complaint.

THIS section will comprehend,

1. Petition for recording a deed of entail;
2. Petition for a sequestration; for a factor *tutoris*; and the like;
3. Petition for a sequestration, in terms of the late bankrupt statute;

4. P

Petition and complaint against members of the College of Justice for malversation in their office ; or against parties for wrongs done in depending processess ; and the like ;

Petition and complaint in order to a trial for forgery.

1. *Petition for recording a Deed of Entail.*

To give full effect to a deed of entail, executed in terms of the act of Parliament 1685, St. 1685. c. 22. must be recorded in a particular register kept by the clerks of session for that purpose.

In order thereto, the deed itself must be presented to the Court of Session, along with a petition, in the name of the entailer or of an heir having interest in the destination, setting forth the general purport of the entail, and praying the Court to interpose their authority thereto, and to ordain the same to be recorded in the register of tailzies, agreeably to the directions of the statute.

This petition requires no intimation, the decree of it being granted of course, as a warrant for the clerk's receiving and recording the deed.

2. *Petition for Sequestration, &c.*

In cases of bankruptcy, or competition of creditors, in order to prevent any loss that might happen to parties during the litigation the Lords may sequester the estate, and appoint a factor for managing it. This is obtained upon a petition to the court, at the suit of any of the parties concerned, which must be intimate according to the forms prescribed with regard to incidental petitions.

A. S. 22d
Nov. 1711.
§ 10.

The act of sequestration is pronounced by the Lords in presence; but they usually remit to the Lord Ordinary in the cause to name the factor; who must find caution to account for his intromissions, and also to obey the rules and instructions appointed by the Lords.

— 5th
June 1790.
— 17th
July 1764.

Petitions for sequestrations cannot be received after the 25th of June for the summer-session and the 20th of February for the winter-session.

Upon the factor's finding caution, he must extract an act of factory, as his warrant for uplifting the rents and managing the estate.

— 22d
Nov. 1711.
§ 6.

The factor must, within six months after extracting his factory, make up a rental of the estate, and a list of the arrears of rents, to be reported to the Lords, and lodged in the hands of the clerk of process, there to remain, and to be

made forthcoming to all parties having interest; which rental and list of arrears are to constitute the charge against him.

When any alteration happens in the rental, A. S. 22d
each alteration must, within three months, be Nov. 1711.
reported to the Lords. This is done by lodging § 7.

the same in the clerk's hands, who moves it in court, and puts a marking to that purpose thereon.

If any part of the rental, or charge, shall be Ibid. § 8.
omitted, or concealed, the factor is liable for
double of what is so omitted.

The factor must, once every year, give in to Ibid.
the clerk of court, a scheme of his account,
charge and discharge, under the penalty of a
fine, to be modified by the Lords, not under
half a year's salary, and also of being liable to
be removed.

Factors have one year after the term of pay- — 13th
ment allowed to them for the recovery of rents Feb. 1739.
debts; after which they are liable to pay in- § 1.

interest for the money received, and what they
might have received by doing diligence; and — 5th
they cannot purchase in any debts affecting the Dec. 1708.

estate, or take the benefit of abatements or gra-
tuities from any concerned.

These regulations apply also to factors on the Ibid.
estates of pupils not having tutors, of persons
absent who have not authorised any to act for
them, or of persons under incapacity for the
time;

time; in all which cases, the factors are appointed on an application by a petition to the court, which is intimated on the walls of the inner and outer-house, after being moved to Court; together with a copy of the interlocutor ordering such intimation; and intimation is further ordered to be made to such of the relations of the person under incapacity, as circumstances may point out to be proper.

These factors are also by this act laid under additional regulations, for making up inventories, and for confirming debts and moveables in their own name, when necessary. And they are impowered to grant tacks, to continue during the time the estate shall be under sequestration, and for one year longer; but factors of bankrupt estates are seldom authorized to grant tacks for more than three years certain.

A.S. 13th
Feb. 1730.
§. 8.

ib. § 11.

The cautioners for factors are bound with the factor, jointly and severally, that the factor shall obey the rules laid down in this act, which he may be otherways liable to by law.

— 23d
Nov. 1710.

Writers, and other dependents on the session are declared incapable of being factors on incumbered estates, notwithstanding they should have the consent of the creditors. But this regulation has gone into desuetude.

Petition for

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Petition for a Sequestration, in Terms of the late Bankrupt Statute.

It is not intended here to enter into the minute requisites laid down in the statute, to ground this application. In doing so, we would far exceed the limits which, in a work of this kind, must necessarily be prescribed to every separate process. Nor is it necessary in any respect to do so; as any one who is to practise in cases where the statute applies would wish to resort to the statute itself, seeing most of the rules there laid down must be observed under the sanction of absolute nullity; and when once the act is applied to, the regulations applicable to every step will be found laid down so minutely as to render any commentary in this place altogether superfluous.

Our object here, therefore, is only to give such a view of the application to the Court, as may enable the reader to form a general idea of the nature of it, compared with others, of which we have occasion to treat.

By this statute it is made lawful for the creditors of those concerned in trade and manufactures, and under the special description therein set forth, or for the debtors themselves, in special circumstances, to apply for sequestration of their estates,

23 Geo. 3.
c. 18. §. 6.

estates, real and personal, by a summary petition to the Court of Session, while the Court is sitting, or to the Lord Ordinary on the bills, at any time of vacation.

The deliverance on this petition, when preferred by the debtor himself, in terms of the statute, awards sequestration immediately. When the petition is preferred by creditors only, the deliverance warrants a citation to be given to the debtor, by delivering to him personally, or by leaving at his dwelling-house a copy of the petition; or, if he be out of Scotland, by affixing copies upon the market cross of Edinburgh, the pier and shore of Leith, and also leaving a copy at his last dwelling-house, or house of business in Scotland, to appear in Court within the time specified in the warrant of citation, not being less than six, nor more than forty days from the date of the citation, to show cause why sequestration should not be awarded; and, at granting this warrant for citation, the Court or the Lord Ordinary will, if desired, grant diligence for recovery of written evidence to instruct that the debtor is under the predicament described in the act.

Upon production of such evidence at the day of appearance, if satisfactory proof is not produced to take the debtor out of the description of the act, and unless he also pay the debt due

the creditor immediately. By the fact of sequestration

a certain period, in order to be made; which is certified in the Edinburgh Register, as chosen, as any afterwards every step of the process is laid down

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Summary of the competences of these processes, which originates from the complaint and is founded on the fact, and are connected with malversation, and processes, and in dependence. Of the late process of sequestration, and of the rights connected with it

the creditor petitioner, sequestration will be immediately awarded.

By the same deliverance which awards the sequestration, the creditors are directed to meet at a certain place, and upon a certain day and hour, in order to name an interim factor on the spot; which deliverance must be forthwith advertised in the Caledonian Mercury, and the Edinburgh Evening Courant. And the factor chosen, as also the trustee whom the creditors afterwards appoint, must be regulated in every step of their management by the special rules laid down in the statute.

23 Geo. 3.
c. 18. § 7.

4. *Petition and Complaint.*

Summary complaints to the Court of Session are competent in a great variety of cases. In some of these, the summary mode of procedure originates from the connection which the person complained upon has with the court. In others, it is founded on special statute. Of the first kind, are complaints against members of Court, for malversation in office; and against parties to processes, for any wrong done relative to the execution in dependence.

Of the latter kind are complaints at the instance of freeholders for penalties imposed for wrongs committed in the election and return of

16 Geo. 2.
c. 11. § 11.
§ 17. &c.

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Mem-

25 Geo. 3.
c. 80. § 1.
29.
10 Geo. 2.
c. 28. § 6.

Members of Parliament; complaints at the instance of his Majesty's advocate, and the solicitor of his Majesty's stamp-duties, for the penalties imposed by the late statute, laying a tax on solicitors and agents; complaints for penalties incurred by acting plays; and sundry others.

These applications are not intimated to the party concerned, before advising. But when moved in Court, warrant is granted for service on the party; and he is ordained to give in answers within such a space as may be pointed out by the statute, or, if that is not determined within such time as to the Court may seem proper.

Upon this an act and warrant for service is extracted; and the service is made by a messenger delivering or leaving for the party complained upon, a copy of the complaint and deliverance of the Court thereupon.

Answers being given in, and replies, when necessary, the Lords proceed to determine the merits of the complaint summarily, without abiding the course of any roll.

5. *Petition and Complaint in order to a trial for Forgery.*

The crime of forgery may be tried either before the Justiciary or the Court of Session; but

at the i the peremptory diets peculiar to the former are
the folio a great measure inconsistent with the mass of
penalti idence which it is frequently necessary to
a tax ing in the trial of this crime.

penalti The mode of application is by a petition and
others complaint preferred to the Court, in the name
ed to t his Majesty's advocate, for his Majesty's in-
But wh rest, and of the private party, against whom
or servi e crime is committed, with concurrence of his
d to gi Majesty's advocate.

e point The petition sets out, in the style of an in-
termine tment, "That by the laws of this and all
ay fee other well-governed realms, the forging or
counterfeiting, or the procuring and causing
service to be forged or counterfeited, any securities,
a mess bills, obligations," are crimes of a heinous
ty co nature, and severely punishable, and so on;
e and d after which it subsumes the special circum-
ances of the case, and concludes that these, or
es, wh art thereof, being proven, a punishment must
mine t allow suitable to the offence; and therefore
witho rays their Lordships to take trial of the pre-
ies; and after trial, to give such decree or
rder as by the course of law ought to be made,
to the terror of others; and for that purpose, to
trial f grant warrant for serving the petition and com-
plaint upon the party, by delivering to him,
ither b personally, a full copy thereof, and of the list
on; b of witnesses and writings condescended on, and

for summoning him to answer the same, upon fifteen days warning; and also to grant diligence for citing the witnesses and the havers of the writs referred to.

The complaint being moved, warrant granted for serving, and the relevancy being determined, on advising either with or without answers, diligence is granted against witnesses and havers, and a day is fixed for commencing the leading of the proof, which must be taken before the Lords in presence.

When the proof is concluded, and advised by the Court, if it is such as to warrant only the punishment of whipping, pillory, or banishment, the Court will order it to be inflicted; but if it amounts to a capital crime, the Lords pronounce a decree, finding such and such points proven, reducing and improving the forged deeds, and remitting the criminal to the Court of Justiciary.

This decree, act, and remit, is extracted by the prosecutors; after which the criminal is served with an indictment for trial before the Justiciary, in which indictment the sentence of the Court of Session is founded on; and at the trial it is read to the jury as evidence against the pannel.

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PART II.

Processes commenced in an inferior Court, and from thence removed to the Court of Session.

CHAP. I.

Of Preliminaries.

PROCESSES before inferior courts may be removed to the Court of Session any time before extract, by *advocation*; or, after the decree is extracted, by *suspension*, whether a charge has been given or not.

Advocation and suspension are writs issued in the King's name, under his signet, and signed by a clerk to the signet.

These writs proceed upon a warrant signed by one or more of the judges *causa cognita*, upon a bill of complaint subscribed by a writer to the signet, and preferred in name of the party who thinks himself aggrieved, setting forth the reasons why the cause should be either advocated or suspended.

All these bills must be presented by the clerk of the bills, or his servant; and, in time of session,

A. S. 9th
Feb. 1675.

to

A. S. 9th
Nov. 1680.

to none other than the ordinary on the bills for the time. The clerk is directed to keep a record of all such bills, according to the order of time in which they are presented, and a minute book, both of passed and refused bills, by the alphabetic order of the parties surnames, which he is to make patent to every charger, gratis when desired.

— 8th
Aug. 1789.

The Lords, by turns, attend the advising of bills for a week, *viz.* from Monday to Saturday, both days included; and all bills are advised by the Lord Ordinary in the first instance.

The usual time of attendance is from nine to ten in the morning, in time of session, and from eleven to twelve, on Tuesdays and Thursdays, in time of vacation.

— 11th
Nov. 1691.

Bills presented in time of session must remain until advised before the Lord Ordinary, to whom they are first presented; but bills presented in time of vacation, and not advised within the week, are advised by the Ordinary for the week following.

On the subject of suspensions and advocation a variety of regulations have been made, some of which are applicable to advocations only, some are confined to suspensions, and others are common to both. In that order, therefore, they fall to be here treated of, as divided into three distinct sections.

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SECTION I.

Of Bills of Advocation.

SOME causes are so peculiarly appropriated to other courts that they cannot be advocated in the Court of Session. These are,

1. Proceedings before the judge-admiral, in *maritime* causes. In *mercantile* cases, where the admiral's jurisdiction is not exclusive of other judges, it is generally understood that advocates are competent. St. 1681.
c. 16.
Erskine's
Inst. b. 1.
t. 3. § 34.
 2. Causes not exceeding 12*l.* sterling. Members of the College of Justice, however, are intitled to advocate them on the ground of privilege alone. 20 Geo. 2.
c. 43. § 38.
St. 1555.
c. 39.
— 1672.
c. 16. § 16.
 3. Process for profanity and immorality. — 1696.
c. 31.
 4. Process for payment of Ministers stipends. — 1695.
c. 27.
 5. Also causes properly consistorial. For — 1609.
c. 6.
- Although the act of Parliament 1609 expressly allows advocations from the Commissaries, yet the Session never does advocate such causes; but, on a bill being preferred to that effect, a permit is made to the Commissaries, with instructions how they shall proceed.

The reasons of advocacion usually urged are,

1. Incompetency of the court before which the action is brought.

2. Con-

2. Contingency of the cause with another already depending before the Session.

3. Iniquity in any decision pronounced.

4. Personal objections to the judge.

All bills of advocation may be *refused* by one Ordinary. They may likewise be *passed* by one; and it is not requisite that caution be found by the advocator; except in removing, which must be passed by two Ordinaries in time of vacation, or the whole Lords in time of session, and in these the Advocator must find caution within ten days, in the same manner as in suspensions of decrees of removing, not only for what may be decerned on the advocation, but for such damage and expence as may be found due.

A. S. 10th
Aug. 1776.

— 14th
Dec. 1756.

SECTION II.

Of Bills of Suspension.

ALL causes may be brought under review by suspension, under the following restrictions.

1. By special statute, decrees arbitral on subscribed submissions can only be *reduced* on the head of corruption, bribery, or falsehood; and the inductive reason of this enactment shows sufficiently that it must also exclude *suspension* of these decrees.

St. 1672.
§ 19. c. 16.

2. Decrees of the Lords in *foro contradictorio* cannot be suspended upon reasons competent to have

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have been proposed, or which were repelled in the former decree. But suspension will be admitted upon discovery of any important matters of fact, not known to the party when the decree was pronounced. And under this act, decrees are held to be *in foro*, when defences are once proposed, although the advocate for the defence should afterwards withdraw his appearance; and second and posterior protestations seem to be received in the same light.

Bills of suspension, in the general case, pass upon caution. But payment or consignation is required before suspension can pass of the following charges :

- | | |
|---|--------------------------------------|
| 1. For payment of minister's stipend, | St. 1695.
c. 27. |
| 2. For university and hospital rents, | — 1696. |
| 3. For the salaries of parish school-masters, | c. 14.
— 1696. |
| 4. For the rates to the ministers' widows' fund, | c. 26.
— 19 G. 3.
c. 20. § 55. |
| 5. For payment of bank-notes, | — 5 G. 3.
c. 49. § 5. |
| 6. Where the suspender alledges no other reason than multiplepoinding being raised, | A. 8. 16th Jan. 1650. |
| 7. Whenever arrestment is alledged, but no multiplepoinding raised, | — 1 Feb. 1677. |
| 8. Decrees for profanity and immorality, | St. 1696.
c. 31. |
| 9. First protestation, in which case the sum to be consigned is 30 <i>l.</i> Scots. | — 1672.
c. 16. § 19. |

One Ordinary may *refuse* any bill of suspension, if he see cause. But the rule that one Or-

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dinary

ordinary can *pass* all bills of suspension, suffers the following exceptions:

1. Suspension and liberation,
2. — on juratory caution,
3. — without caution or consignation,
4. — of decrees of removing.

A. S. 14
Dec. 1756.

All which, to the passing of them, require two

— 10 Aug.
1776.

Ordinaries in time of vacation, and the whole Lords when the Session is sitting.

St. 1672.
c. 16. § 19.

5. Suspensions of decrees *in foro* of the Court of Session,

— 1681.
c. 16.

6. — of decrees of the-judge admiral, in maritime causes,

A. S. 29
Jan. 1650.

7. — of decrees of the Session, after discussing a former suspension for liquid sum or deeds presently prestable,

St. 1672.
c. 16. § 19.

8. — of a second protestation ; which require three Ordinaries in time of vacation, and the whole Lords in time of session. And,

A. S. 6th
Dec. 1677.

9. Suspensions of charges for his Majesty's exchequer ; which can only be passed by the Lords in presence.

The act of *federunt* 9th Nov. 1680, requiring three Ordinaries to pass a second bill of suspension, where a former was refused, has gone into disuse. By the present practice, a second, third or fourth bill may be presented in time of vacation ; the prior bills being always presented along with the new one : but in time of session

— 9th Feb.
1675.

the first is refused, the only redress is by petition to the Court. A. S. 11th Mar. 1789.

When decree for a sum under 12*l.* sterling is gone in absence before an inferior judge, the bill of suspension must be remitted to him, unless he be incompetent; and the suspender, before being heard, must consign in the clerk's hands the whole expense incurred by the charger, in suing, extracting decree, and charging thereon; as also the expense incurred in the bill-chamber, as modified by the inferior judge. And such remit will import no first of diligence, unless intimated to the charger, and the bill and remit lodged in the inferior court. — 11th Aug. 1787. § 4.

SECTION III.

Bills of Suspension and Advocation, and Process upon them in the Bill-chamber.

WHEN the bill is presented, it is either refused by the Lord Ordinary, or ordered to be answered. If refused, it was above observed, that a second, third, fourth, &c. may be presented in time of vacation, the former bills being always presented along with the new one; but that in time of session, the remedy is by petition to the Court. If ordered to be answered, and is a bill of *suspension*, intimation must be made

A. S. 9th Feb. 1673.

— 11 Mar. 1789.

to the charger personally, by reading over in his presence the bill and the list or interlocutor of the Lord Ordinary, before two witnesses, or otherwise by leaving a copy thereof before witnesses at his dwelling-place; the person who intimates, and the witnesses present, returning a certificate of the intimation, under their hands.

When the charger's place of residence is at a distance, the suspender's agent makes a notarial copy of the bill and the deliverance thereof, and transmits it to the country in order to intimate, so that the principal bill may be returned to the bill-chamber in due time, and without running any hazard of losing it in the conveyance.

The intimation may be made by any person, whether notary or not.

When a bill of *advocation* is filed, no intimation to the party need be made; but the bill must be intimated in the inferior court where the cause depends.

A. S. 9th
Feb. 1675.

—9th Nov.
1680.

In conformity to the acts of *federunt*, the time in suspensions is always limited by the deliverance to fourteen days; but it is understood in practice, that, when once obtained, it stops further procedure till the bill be advised, if the other party appear and take the bill to answer.

The subject of discussion in the bill-chamber is to wit, Whether the bill shall pass or be refused.

over the necessary expense and delay to the parties, by the mode in which it was usually conducted, a regulation has been made, prohibiting any papers to be laid before the Lord Ordinary, than bills, answers, and replies, unless by special interlocutor of the Lord Ordinary, by whom these papers are advised.

Replies must be lodged within a week after the answers; and duplies, when any, within the time limited by the Lord Ordinary's interlocutor; and, for ascertaining whether they are so lodged, the clerk of the bills is required to inform the date on which the papers are put into his hands. And he is discharged from presenting to the Ordinary any papers which are not signed by an advocate, writer to the signet, a licensed agent, or the party.

The bill, answers, and other papers being lodged, the Lord Ordinary will advise the cause, or if he find difficulty in it, or the case be such as requires the consent of the Lords, he goes to the foot of the clerk's table, in the inner-house, and states the nature and circumstances of the case, on hearing which, the Lords give their opinions for passing or refusing the bill; agreeably to which the Lord Ordinary pronounces his interlocutor, which specially mentions his having advised with the Lords.

The

A. S. 11th
Aug. 1787.
§ 1.

Ibid. § 2.

Ibid. § 3.

The cause being advised in one or other of the ways, the bill is either refused or past. If it is refused the party may still seek redress, in the manner before explained: if passed, it becomes a warrant for expediting letters of suspension, or of advocacy, as the case may be, under the signet.

Previous to which, however, in the case of *suspensions*, caution is in general required; and a bond to that effect, signed by the suspender and a good cautioner, must be lodged with the clerk to the bills, within fourteen days after the bill is passed, otherwise the charger may go on with his diligence; in which case it is proper previously to take out a certificate from the clerk of the bills that no caution is found.

A. S. 3d
July 1677.

— 18th
Feb. 1686.

The clerk of the bills being responsible for the cautioner, if he has reason to doubt his circumstances, he requires an attestor; that is, one to corroborate the cautioner's security.

— 27th
Dec. 1709.

The cautioner, when received, is liable to the payment of the debt, with expenses, if found due, jointly and severally with the suspender, and the attestor is bound *subsidiarie* for the cautioner.

— 3d
July 1677.

When caution cannot be conveniently found within the fourteen days, the Lord Ordinary of the bills will enlarge the term, upon the suspender's application; but so as the whole time allowed may never exceed a month from the date of passing the bill.

In removings caution should be found within
 days, not only for what may be decerned
 with regard to the removing, but also for da-
 mages and expenses; and that, whether the
 bill passed be a *suspension* or an *advocation* of the
 removing, as already observed. In practice,
 however, fourteen days are usually allowed, as
 in ordinary cafes.

Caution being found, or consignation made,
 deliverance mentioning the fact, is written
 upon the bill, which then becomes a full
 warrant for expeding the letters; after which
 diligence or procedure can take place till the
 merits of the cause be discussed.

We have thus given a connected view of the
 procedure in the bill-chamber, which takes
 place in ordinary cafes. Particular circum-
 stances, however, often occur to render the
 proceedings more circuitous and intricate.
 These we shall now endeavour to enumerate,
 without adhering to any order, which is not
 necessary, the particulars we are to take
 notice of being all independent of one another.

Bills of suspension containing charge to set at
 liberty, and also those on juratory caution,
 should be intimated to the creditor personally,
 at his dwelling-place, by a notary, and wit-
 nesses, if within Scotland, before the bill be
 presented; which intimation should be in-
 structed

A. S. 14th
 Dec. 1756.

— 21st
 July 1673.
 — 8th
 Nov. 1682.

fructed by an instrument under the notary hand; and the bill presented within a week after such intimation. But these acts are in general observance.

St. 1672.
c. 16. § 19.

In order that it may appear what number bills of suspension have been offered of the said charge, the clerk of the bills is ordered to make the number on the deliverance of the bill.

A. S. 29th
Feb. 1688.

When the reasons of suspension are offered, be proved by the charger's oath, if the reasons are relevant, the Lord Ordinary is authorized to take the charger's oath when present; and, absent, his Lordship is directed to take the suspender's oath of calumny, that he has just reason to propound such ground of suspension. If he depone *affirmative*, or if he be not present, he shall give his oath, in either of these cases the Lord Ordinary is directed to pass the bill, with the quality, "That the suspender shall be liable for the charges and expenses the charger shall be at through the purchasing of that suspension, and in discussing of the same, according as he shall depone upon these expenses, without any modification thereof, if the letters shall be found orderly proceeded."

— 20th
Nov. 1711.
§ 2.

By a subsequent act it is provided, "That where a reason of suspension or advocation, in passing, is offered to be proven by the contrary party's oath, and the said party is

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sent, so that his oath cannot be got; the bill, in so far as concerns that reason, is to be refused, unless the suspender, or raiser of the advocacy, do give his oath of calumny thereupon, in case he be present; and if absent, that some document be produced under his hand for instructing, that the reason is not insert in the bill by the drawer without a warrant; which document, and other vouchers presented with the bill, shall be kept by the clerk of the bills, unless delivered up by him to the party upon inventar and receipt; and at or before discussing, the same, or the inventar or receipt mentioning them, shall be transmitted to the clerk of the process, to the effect, that if the reasons prove calumnious, or the vouchers be disproven, the suspender, or raiser of the advocacy, may be decerned in expences."

By the same act the Lord Ordinary is authorised to pass bills of suspension in part, and to refuse them as to the remainder, as he may think proper.

A. S. 20th
Nov. 1711.
§ 1.

The Lord Ordinary on the bills, either in time of session or vacance, may grant commission to

— 6th
Dec. 1718.

take the oath of an absent party, on any relevant point relating to the passing or refusing of bill of advocacy or suspension; and may grant a sist in the mean time, not exceeding a

B b

month

month, when the commission is granted by one Ordinary, and not exceeding two months if granted or prorogated by three Ordinaries.

After a bill is passed, it is competent to the opponent to apply to the Court by petition for redress, provided it be done before the letter pass the signet.

Confignation, when requisite, must be in the hands of the clerk of the bills.

A. S. 27th
Dec. 1709.

The act of *federunt* in 1709 declares, That cautioners shall be liable for what may be decreed against the suspender, though the decree charged on shall be turned to a libel.

— 29 Jan.
1650.

Bonds of caution in suspensions must contain a clause, obliging the cautioner, his heirs and executors, for payment of the sums, or performance of the deeds, for which he is become cautioner in the suspension, in the same manner as the suspender is bound; and such bonds must also be conceived with an alternative to pay or to perform to the charger, or “to such unto whom payment or performance shall be decreed to be made, by the decree to follow on the said suspension.”

— 23 Nov.
1717.

— 18 Feb.
1686.

The clerks of the bills are liable to the party damage, as well where they refuse a cautioner who is sufficient, or is holden and reputed to be sufficient, as where they receive an insufficient cautioner.

To

To prevent imposition by production of forged discharges, or other writings, for verifying reasons of suspension, such writings are ordered to be kept by the clerk, or marked by him, and given up only upon receipt when required; and by another act, the Lord Ordinary is ordered to mark such writings.

A.S. 29th
Jan. 1650.

Both these acts, however, have gone into disuse, so far as concerns marking the writings.

When the suspender offers only juratory caution, the bill must bear so, and before the bill is passed, he must give in a disposition of all his estate, real and personal, upon oath, in favour of the charger, as in a *cessio bonorum*.

— 11th
Nov. 1691.

In this case the suspender cannot have the benefit of a commission, but must depone in presence of the Lord Ordinary. And on juratory caution no liberation can be obtained.

— 8th
Nov. 1682.

The party to whom caution is to be found, may pass from the benefit of it, if he choose, and before the suspension or advocation pass the signature, he may apply to the Lords by petition, praying a remit to the Lord Ordinary to discuss the reasons upon the bill: upon which a remit will of course be granted.

Ibid.

Advocations are sometimes executed by a messenger in the way of a summons, citing the party to appear in court at the day appointed; in which case, the advocation may be called as a

summons in the outer-house. The same for which he g
is competent in suspensions; but as the suspen marked,
der is generally desirous that the matter shou mark on the
lie over, the execution and calling of suspension in within,
in the way of summons, is not very common. actor B. a

A. S. 29th
Jan. 1650.

After the first day assigned in the advocati The lette
or suspension is elapsed, the opposing party m gent for th
call for production of the letters, by putting suspension
a protestation in the minute-book; and if the reaf
letters are not produced by the time the prot e decree,
tation is read in the minute-book, and the e libel or
cond diet of compearance is elapsed, the p parties be
testation may then be extracted; the effect us: " 22
which is, that no regard shall be had to the and execu
vocation or suspension; and the party who fee; and
tains the protestation is intitled to a warrant thereof."
payment of 8*l.* Scots of expenses, in case bel, execu
sum charged for is within 100 merks, and interlocu
Scots when it exceeds that sum: and, in case fee; and
an advocation, 15*l.* Scots. these return

— 4th
July 1661.

The manner of putting up protestation in fust always
pensions and advocations, differs so little from ven out, a
what is observed in ordinary actions, before ate for the
treated of, that nothing more need be here fa The other
on the subject. e writs fo

When the letters are produced at the minute ary actions
book, the keeper marks upon the back the usual m
names of the advocates for the parties that returned;
"Produced *per* A. to B.;" and deletes the p suspension.
testation in the principal minute-book. Af
whi

same for which he gives in the suspension or advocacy
 the suspension marked, to the clerk of process, who puts his
 ter should mark on the back of the letters, and on the mar-
 suspension in within, a calling thus; " 20 Nov. 1790,
 common, factor B. alter A. To see."

advocation The letters, thus marked, are delivered to the
 party m agent for the party who opposes the advocacy
 putting suspension; after considering or taking a copy
 and if the reasons therein urged, he writes upon
 the pro the decree, if it is a process of *suspension*, or on
 d the the libel or other part of the principal process,
 the p parties be now in an *advocation*, an out-giving,
 e effect us: " 22 Nov. 1790, Given out this decree,
 to the and execution of charge indorsed to A. To
 who see; and returned the letters of *suspension*
 warrant thereof." Or, " Given out this principal li-
 case bel, execution thereof, minute in process, and
 and interlocutor of the sheriff thereon, to A. To
 in case see; and returned the *advocation* thereof."

these returns, it is almost needless to observe,
 on in must always be made applicable to the writs
 ttle from given out, and must be subscribed by the advo-
 s, before ate for the party.

here for The other party is entitled to have perusal of
 the writs so given out, for six days, as in ordi-
 minute ary actions, after which he returns them with
 back the usual marking, " 29 Nov. 1790, seen and
 es thus returned;" retaining his own advocacy or
 the p suspension. And upon this return, the cause
 Aff may
 while

may be inrolled in the suspension-roll for the week following.

A. S. 11th
Aug 1787.
§ 5.

The same rules are applicable in these outgivings and returns, with regard to the parties stating fully their pleas, and producing the writs they are to found on, which take place in the out-giving and return in ordinary action already fully treated of.

The above is the common train of procedure held in advocations and suspensions. In the special case, where the *pursuer* advocates his own cause, the steps competent to the defender are marked out by a particular act of *federum* in the 1709.

— 1st
Jan. 1709.

By this act it is ordained, " That where
" pursuer before any inferior court advocate
" his cause, and does not insist within *fifteen*
" *days* after admitting of the advocation (not
" reckoning the vacancy), and causes call
" the same, and give it out with the process
" cess to the defender's procurators to see
" that then, and immediately thereafter, the
" defender may call for the advocation, and
" put up a protestation at the minute-book
" whereupon the pursuer shall be obliged
" to produce his advocation, with the principal
" cipal process, and an outgiving thereon
" otherwise the protestation and remit shall
" not be scored, but given out to be ex-

" tracted

l for t racted ; and the defender, when the advo-
cation is so produced, with the process and
these ou outgiving, shall be allowed, before he return
the parti the process, to inroll the same in the roll of
the wr suspensions and advocations, upon his own
ce in t advocate's return ; and for that effect, allows
action the defender's procurators to keep up the
rocedu process six days allowed for seeing, and until
the first *Saturday* in session-time thereafter,
In t so as he may get the process inrolled."

By the same act, the clerks of the bills, and A. S. 1st
Jan. 1709.
defende ir deputes, are ordained, "under the pe-

federu nalty of 5*l.* sterling, to give up all protesta-
tion-money consigned in their hands, with-
where out any fees, to the party concerned, upon
advocat ight of the extracted protestation, or decree,
n *fifte* finding the letters orderly proceeded, and re-
ion (n ceipt of the party in a discharge, expressing
ses ca the substance and date of the warrant, with-
he pro out necessity to leave the Lords warrant."

to fe li, instead of extracting the protestation, the —9th Nov.
1680.
fter, th arger be desirous to try the merits of the
on, an e, he may extract the suspension from the
e-book net ; and, upon production of such extract,
oblige e Lord Ordinary, besides the usual protesta-
e prin n-money, will give large expenses against
hereon suspender, on account of the delay.

it shal With a view to discourage, as far as possible,
be ex unnecessary and improper litigation in the
tracted bill-

A. S. 19th
Dec. 1778
— 7 Mar.
1782.

bill-chamber, it is declared, " That, in every
" case where a bill of suspension or advocatio
" has been appointed to be answered and
" answers accordingly made thereto, and the
" bill finally refused, the Lord Ordinary or O
" dinaries, where two or more are necessary,
" he or they shall see cause, are hereby auth
" rised, by a signature upon the bill, to fin
" the suspender or advocator liable in the e
" penses of the litigation in the bill-chambe
" and to ascertain the *quantum*, and to decre
" in payment thereof; against which decre
" ture no representation to the Ordinary sha
" be competent; and the clerk to the bills
" hereby authorised and required to enter th
" same in a minute-book, to be kept by him
" for that purpose, open to all the lieges, with
" out any fee, and to give forth an extra
" thereof, for which extract he shall be in
" titled to receive a fee of two shillings ste
" ling; and upon production of said extra
" to the Lord Ordinary on the bills, officiating
" for the time, he shall, as in the case of othe
" common bills, grant warrant for letters
" horning to be thereupon raised."

But, in order to give the party opportunity
to apply for redress, by petition to the Lord
it is declared, " That, where expenses are
" awarded, as aforesaid, at any time during the

" session

session, it shall not be allowable to extract the said decree, till after the lapse of five *federunt* days, as the same are reckoned in the inner-house from and after the same being entered in the minute-book aforesaid; and if awarded during the vacation, or during the last five *federunt* days of either session, not till after the lapse of five *federunt* days from and after the meeting of the ensuing session, without prejudice to the parties proceeding in the subject matter of advocation or suspension, immediately after the bill is refused, as formerly." The act further declares, "That, when a petition reclaiming against the interlocutor of an Ordinary, refusing a bill of suspension or advocation, is presented to the Court and finally refused, the Lords, if they see just, may decern for the expense of the answers, or other proceedings on the petition, and may also give expenses though refused or omitted to be given by the Ordinary, if application shall be made to them to that effect; and the decret pronounced in any of these cases being extracted, diligence shall pass thereon, in common form; declaring that where expenses are refused by an Ordinary, no representation to the Ordinary shall be competent, the interlocutor shall, by the clerk of the bills, be insert in the minute-
C c " book,

“ book, but it shall not be allowable to extrad
 “ the same, sooner than as in a decerniture fo
 “ expences, to the end that in both cases partie
 “ may have the same time and opportunity t
 “ apply for redress to the Lords in the inner
 “ house.”

C H A P. II.

Proceedings before the Lord Ordinary in the Outer-house.

A. S. 16th
Jan. 1650.

AT the hearing of the cause before the Lord Ordinary, the reasons ingrossed in the suspension, and referred to the charger's oath at the time of passing the bill, must be insisted on in the first place, and the party's oath taken or passed from. If such reasons be repelled either as irrelevant, or as not proved, expences will be given; which the suspender must pay, or consign, before he be heard upon any other reasons of suspension, excepting such as shall be instantly proved by writing.

If the advocator, or suspender, neglect to produce the advocation or suspension when the

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cause is called, the Lord Ordinary will grant protestation; which has the same effect with a protestation put up in the minute-book.

Where a judicial protestation, or protestation and remit, is admitted by the Lord Ordinary, through the keeping up of suspensions or advocations, unless the cause be again called by the Ordinary, and the suspension or advocation also produced the same week, before the suspension or advocation be taken in by the clerk, or the party reponed against the protestation, he must pay to the contrary party, or to the clerk for his behoof, the sum of *ten* shillings sterling.

And the like sum is ordered to be paid where the suspender or advocator allows a decree finding the letters orderly proceeded, or an act and remit, to be pronounced, for not debating the reasons of suspension or advocation, before the party is allowed to be heard against the said decree or act, unless application be made to the Lord Ordinary, and a stop obtained in writing, within six free days after the date of the decree or remit.

If, upon hearing the reasons of advocation, the Lord Ordinary shall be of opinion, that decree ought to pass against the advocator, he may either advocate the cause, and pronounce decree, or he may remit it to the court where it first depended. This last is more eligible when

A. S. 1st
Jan. 1709.

the question in dispute is of small importance; in which case, the process is remitted to the court from whence it came, with instructions to the judge how to proceed.

If the decree suspended shall have proceeded upon the defender's being held as confessed, or a reference to oath, he cannot be reponed until he pay the expense of obtaining and extracting the decree before the inferior court.

If it shall appear that the decree suspended is only defective or irregular as to form, though the debt decerned for may be justly due, the Lord Ordinary will turn the decree into a libel, which obliges the defender to propone his defences as in an original action; but if the reasons of suspension are instantly verified, he will suspend the letters.

If the reasons of suspension are either irrelevant, or not instantly verified, the letters shall be found orderly proceeded.

After the first hearing in the outer-house, the form of proceeding, in advocations and suspensions, is the same as in ordinary actions: except in advocations and suspensions of processes of removing, which are intitled to be discussed summarily, without abiding the course of any roll.

A. S. 14th
Dec. 1759.
§ 7.

C H A P. III.

Process of Prevento termino.

AS the charger cannot insist to get the reasons of suspension discussed till the expiration of the diets mentioned in the letters, it was anciently common to apply for as distant days as possible, on purpose to postpone payment. To remove this hardship on the creditor, he was allowed to bring an action for shortening the period of compearance, styled therefore a process *prevento termino*; and the same expedient was practised in advocations, when a long term was assigned. But as a fixed rule is now universally observed with regard to the days of compearance, both in suspensions and advocations, this action has long been obsolete.

P A R T III.

Of Procefs of Wakening and Transference.

AFTER a procefs is once heard in court, even called by the clerk, if it be allowed to lie over, without any judicial proceeding for a year and a day, it is said to have fallen afleepe, and parties are not obliged to answer without new citation; for which purpose a summons wakening may be raised at the instance of either party.

A. S. 6th
Nov. 1689.

From this rule, however, concluded causes are excepted, which do not require being wakened, because the pursuer, by bringing the cause to length, has done every thing in his power to obtain a discussion.

St. 1693.
c. 15.

If either the defender or pursuer die during the dependence, the procefs must be sifted until proper parties appear. Anciently, the procefs behoved to be transferred actively as well as passively; but now it is not necessary, upon the death of a pursuer, to transfer the procefs actively by raising a summons, but only to produce the person's title who claims under the right of the first party.

In a summons of transference, it is not necessary to libel the whole proceedings of the original process, as formerly; but only to recite the new pursuer's active title, and the passive title against the defender, with the conclusion of the original summons.

A. S. 16th
Feb. 1723.
§ 4.

— 19th
Feb. 1742.

These two summonses of wakening and transference must be called, given out, seen, and returned, as ordinary actions; but need not be enrolled in the ordinary ordinary action-roll for the outer-house.

— 26th
July 1688.

But though the practice is, in the case of a *wakening*, after its being returned, immediately to enrol the process in the hand-roll of the Lord Ordinary before whom it originally depended; yet summonses of *transference* are usually called in the regulation-roll; and a decree of transference must be obtained before any farther proceeding can be had: after which the process is proceeded in before the former Ordinary, as in *wakening*.

The process being wakened and transferred, the proceedings in the original cause go on in the same manner as if the former parties were alive, and the process had not slept.

PART IV.

Of the Minute-Book, Extracts, and the Poor's-Roll

CHAP. I.

Of the Minute-Book:

A. S. 8th
Nov. 1649.

IN order to give parties due notice of the proceedings in Court, a minute-book is kept; in which the writer thereof is ordered to insert all protestations, acts, decrees, and *avisandums* made in the outer-house, immediately after the pronouncing thereof; and also all protestations, acts, and decrees, passed in the inner-house. And in such insertion, the writer is directed to express clearly, the names, surnames, and designations of the pursuer and defender.

— 28th
Feb. 1662.

When a decree, act, or protestation, is pronounced against a defender or suspender in absence, the keeper of the minute-book is ordered to mark it so in the up-putting.

— 9th
July 1709.

By a later act, all acts, decrees, and protestations, are ordered to be inserted in the minute-book, of the date they are signed.

— 10th
Dec. 1687.

When a decree is pronounced against more defenders than one, the names and designation

of all of them must be inserted in the minute-book, under a certification, that if any be omitted, the decree, as to that person, shall be null: but excepting decrees given against tenants in pointings of the ground, removings, and for mails and duties, wherein it shall be sufficient to mention them to be tenants in such a barony or tenantry: but if any of the defenders called, or a third party compearing, shall plead upon his right, and decree be given against him, his name shall be inserted in the minute-book.

The minute-book being intended for notification of the proceedings to the practitioners in court, was anciently read aloud in the outer-house by the clerk, every day, before the Lord Ordinary left the bench. This custom fell afterwards into disuse; and the practice was, to send the book to the agents' houses for their perusal.

A. S. 8th
Nov. 1649.

As the time of reading the minute-book determined the time for giving out extracts, it was ordained that the time of commencing to read the minute-book should be upon the 6th *federal* day of each session, and within three days after the commencement of the Christmas vacation.

— 5th
June 1725.

— 19th
Dec. 1713.

But the certainty of the notification intended by the minute-book, as well as dispatch and accuracy in the proceedings, has been of late

D d

greatly

A. S. 22d Dec. 1781. greatly furthered by printing the minute-book and distributing it among the practitioners twice every week.
 — 9th Feb. 1788.

CHAP. II.

Of Extracts.

A. S. 20th Jan. 1671.

— 5th June 1725.

— 6th Feb. 1748.

ALL protestations, acts, interlocutors, or sentences which require to be extracted must be first put up and read in the minute-book; and no extract thereof can be given out until twenty-four hours after they are first read.

When decree is pronounced, and a representation offered against it is refused, the decree must again be put up in the minute-book. This decree may be extracted upon the elapse of three days after it is last put up.

Decrees of certification in reductions and improbations, or in simple improbations, if pronounced in absence, must remain unextracted for four weeks at least; and decree of certification con-

Act. reg.
1695. § 20.

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ed till ten days after it is pronounced.

A. S. 17th
Jan. 1756.
§ 5.

The Lords sometimes allow acts to be extract-
ed without abiding the reading of the minute-
book; but this must be done by a particular
dispensation in the interlocutor.

Acts and decrees against more debtors than
one, or in competitions of rights, may be ex-
tracted in part, without any necessity of extract-
ing the rest of the proceedings.

A. S. regl.
1695. § 17.

After decree is pronounced, the clerks are en-
titled to the fees of extract, though no extract
should be required.

tors, of
extracted
minute

This was specially determined in a case of
James Stewart of Burry, ingrossed in the *se-
crunt* book.

— 20th
July 1753.

e given
y are f

By the regulations 1695, it is ordained, That
in place of the allowance formerly used in ad-
judications or apprisings, there be only a short
abbreviate made of the decree of adjudication,
after the manner of the said allowance; and
that this abbreviate be, at the pronouncing of
the decree, signed by the Lord Ordinary, pro-
nouncer thereof, and given in to be recorded
within threescore days of pronouncing: after
expiry of which time the clerk is discharged to
take in any abbreviate to be recorded.

— 1695.
§ 24.

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And by the regulations in 1696, it is ordained,
That for the greater security and satisfaction

— 1696.
§ 4.

“ of parties concerned, albeit abbreviates fa
 “ to be written apart, and subscribed before th
 “ extracting of decrees ; yet if any party sha
 “ desire the said abbreviate to be written upon
 “ the back of the decreet, the same shall b
 “ done, if the decreet shall be extracted, an
 “ the same desired within twice sixty days afte
 “ the date of the pronouncing thereof ; and th
 “ same Lord Ordinary who signed the first ab
 “ breviate shall sign the second indorsed.”

Though in this manner it is left optional to
 parties to take one or two abbreviates, and on
 is declared to be sufficient, two abbreviates are
 always signed by the Lord Ordinary before the
 decree is extracted ; one of which is left with
 the clerk who keeps the record, and the other
 given to the party after the abbreviate is re
 corded.

Act regl.
 1695. § 18.

After a decree of the Lords *in foro contradic*
torio is extracted, it cannot be reduced and laid
 open upon nullities, further than to hear parties
 for redress of prejudice sustained by such nullity
 and the rest of the interlocutors in the decre
 stand, *tanquam res hactenus judicata*.

CHA

C H A P. III.

Of the Poor's Roll.

TO protect the poor from the oppression of the rich seems to have been very early an object of the legislature of this country. In the 1424 a special act of parliament was made, commanding all judges whatever, that, " als weil to pure St. 1424, c. 45. as to rich, but fraude or guile, they doe full law and justice. And gif there bee onie pure creature, for faulte of cunning or expenses, that cannot, or may not, follow cause, the King, for the love of God, fall ordaine the judge before quhom the cause fuld be determined, to pur-wey, and get a leill and a wise advocate, to follow sik pure creatures causes; and gif sik causes be obtained, the wranger fall assyth baith the partie skaithed, and the advocatis coastes and travel. And gif the judge refusis to do the law evenlie, as is before said, the partie compleinand fall have recourse to the King, quha fall see rigorousslie punished sik judges, that it fall be example till all uthers."

In

In obedience to this statute, the judges, both in civil and criminal courts, assign counsel and agents to poor suitors when demanded; and the faculty of advocates, and society of clerks to the signet, appoint some of their own number annually, for the service of poor litigants, in their several professions. But as these appointments would be of little use to the poor suitors were the fees of court to be exacted from him at the Court, upon evidence of his poverty, will grant warrant for dispensing with the fees. All which advantages together constitute what is called *the benefit of the poor's roll*.

Notwithstanding a variety of acts of *federunt* for regulating the poor's roll, great irregularities had crept into the management of them. This occasioned a new act of *federunt* doing away the former regulations altogether, and substituting others in their stead: the substance of which is,

A. S. 10th
Aug. 1784.

1mo, That the faculty of advocates shall appoint six of their number annually to be advocates for the poor; and the writers to the signet and agents shall, each of these bodies nominate four of their number to be writers and agents for the poor, in December, yearly, and shall immediately give in, to the senior clerk of court, a list of the persons so chosen.

2do, No person shall be intitled to the benefit of the poor's roll without producing a certificate

under

ges, both under the hands of the minister and two elders
 of the parish where he resides, certifying his
 and the indigent circumstances, and his inability to
 prosecute his claim in a court of law.

Actio. The petition presented to the Court for
 the benefit of the roll shall be ordered to be in-
 mated, by the minute-book, and by copies on
 the walls of the outer and inner-house, ten days
 before being remitted to the advocates and
 writers for the poor, that the other party may
 have an opportunity of laying a state of the
 case before the advocates and writers, for
 enabling them to make a report to the Lords,
 concerning the petitioner's title to the roll, and
 the probable cause of litigation.

Actio. The writers to the signet and the agents
 shall act alternately, as agents for the poor.
 The remit from the Court shall mention by
 name two advocates, and one writer to the sig-
 net; or two advocates, one writer to the sig-
 net, and also one agent; when it is the turn of
 an agent to be named from the body of agents;
 in which first case, it shall be the duty of the
 writer, and, in the latter case of the agent, to
 draw up a full state of the petitioner's case, and
 lay the same before the advocates and writer
 named in the remit: and if their report be
 made in favour of the petitioner, he shall have
 the benefit of the roll, and the same advocates
 and

and writer to the signet shall be named to act as advocate, and as writer for expediting such signet letters as may be necessary : and either the same writer, or the agent mentioned in the warrant, shall act as agent for the petitioner : the advocate, writer, and agent, to continue their services until the final issue of the cause, though before that time they should cease to be in the list of advocates, writers, or agents for the poor.

5^{to}, No warrant for the benefit of the poor shall endure longer than two years (except to allow extracts of decrees *gratis*), unless renewed on a petition to the Lords, signed by an advocate who has been employed in the cause, and the warrant itself shall always bear the term of its endurance.

These regulations point out sufficiently the mode of application for the benefit of the poor's roll. And therefore it is only necessary further to mention, that the petition must specially mention the process for which the warrant is granted, as the warrant extends to no other than what is there specified.

A. S. 20th
Nov. 1686.

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FORM OF PROCESS

BEFORE THE

LORDS OF COUNCIL AND SESSION,

AS

COMMISSIONERS for Plantation of KIRKS, and
Valuation of TEINDS.

PART I.

Of the CONSTITUTION of the COURT.

CHAP. I.

Of the several Commissions.

[I]t will contribute much to a clear understanding of the powers vested in these commissioners, to give a short account of the views which the King and Parliament entertained at the time these commissions were granted.

While popery prevailed in Scotland, the clergy had acquired a very large and extensive landed property, by donations and mortifications made by laymen, to monasteries, abbeyes, and other religious institutions, to which tithes and patronages of many churches had been also gifted.

E e

By

St. 1503.
c. 91.

By an act of parliament in 1503, the vassals of the King, as well spiritual as temporal, were allowed to let their lands in feu, during the King's life, without diminution of the rental; in consequence of which act, and some others afterwards made, churchmen were in use of feuing out their lands, with the tithes included, for payment of a certain feu-duty, both for stock and teind. These tithes, from the words of the grant, got the name of *decimæ inclusæ*; and having been thus consolidated with the stock, were understood to be held by impropriation by the persons who acquired right to them; and were thus exempted from all the burdens imposed on tithes after the reformation.

St. 1587.
c. 29.

At the reformation the temporalities of the benefices were annexed to the crown by act of parliament; notwithstanding which, many of the lands and estates which had formerly belonged to the church, were erected into temporal lordships, and were granted by the King to his favourites. In most of those grants, the tithes and patronages, which formerly belonged to religious foundations, were also comprehended: whence the grantees were called sometimes *Lords of Erection*, and sometimes *Titulars of the Tithes*.

The church being thus stripped of her property, it became necessary to make some provision

for the reformed clergy. For this purpose, as early as 1562, it was ordained by an act of the privy council, that the third of all benefices should be applied to the maintenance of the ministers in the first place, and this assumption of the thirds of benefices was afterwards ratified by parliament.

St. 1567.
c. 10.
— 1592.
c. 123.

That the above fund might be properly distributed among the clergy, a commission was, in the 1561, granted by the King and Queen to several of the nobility and ministers, under the name of *the commission of plat for modifying stipends to ministers*. This court met yearly at Edinburgh in the month of November, and continued to act, until in the 1606 bishops were restored to the whole of their benefices, under an obligation to maintain the ministers within their respective dioceses.

Hope's
Pract. Ob.
tit. 2. § 17.
et c.

As the bishops, however, found means to evade this obligation, a commission was granted by parliament to eight persons of each estate, viz. eight bishops, eight lords, eight barons, and eight burgessees, who were appointed to meet at Edinburgh; and whose business, in so far as concerns the matters now to be treated of, was, 1. To modify a perpetual local stipend, out of the tithes, to the ministers of all churches which had not been formerly provided either with ministers or stipend; and also to the ministers

St. 1617.
c. 3.

sters of such churches as had been provide
with both, in case such stipend did not amount
to 500 merks Scots (L. 27 : 15 : 6 $\frac{1}{2}$ sterling) in
money, or five chalder of victual, besides manse
and glebe.

2. To unite two or more parishes into one
where the tithes of one of such parishes were in-
sufficient to pay the stipend ; in which case the
patrons were to have the right of presentation
alternately.

3. Where the tithes of the parish did not
amount to 500 merks, and where an union was
inconvenient, the commissioners were impow-
ered, besides manse and glebe, to modify the whole
tithes of the parish to the minister.

4. In making such modifications, the com-
missioners are directed to have no regard to tack-
men, patrons, or others, pretending right to the
tithes, so as to bar the intended modification ;
but as a recompense to the tacksmen for the
loss thereby occasioned, the commissioners are
authorised to grant them a prorogation of
their tacks, for such periods as may seem ade-
quate.

5. The *minimum* of the stipend to be modified
to the minister is ascertained to be 500 merks
Scots, (*i. e.* L. 27 : 15 : 6 $\frac{1}{2}$ sterling), or five chal-
ders victual, excepting where the tithes of the
parish do not amount to so much ; and the

maximum

provide *maximum* is limited to 1000 merks, (*i. e.* L. 55 : 11 : 1½ sterling), or ten chalders victual : besides manse and glebe in both cases.

Such ministers as were provided in stipends not below the *minimum*, fell not under the commission ; neither could the stipends of those who were provided beyond the *maximum* be modified or restricted.

In order to enable the commissioners to execute the commission, they are impowered to summon titulars, patrons, tacksmen, and all others pretending to have right to the tithes, to produce their writings and title-deeds : and the sentence of the commissioners thereon is declared to be final.

This commission having expired at Lammas 1618, another was granted by parliament in 1621, much to the same purpose ; but giving the commissioners an additional power to divide the parishes when too large ; and providing that the consent of the patron, tacksmen, and others having interest, should be had, both to the separating and the uniting of parishes.

This commission was declared to subsist only till January 1623.

Charles I. upon his accession to the crown, being sensible of the great loss the revenue suffered by the before-mentioned erections, and wishing also to make a reasonable provision for the clergy,

clergy, revoked all the grants of church-land made by King James his father, and a summons of reduction of these grants was accordingly executed in name of his Majesty's advocate.

Aug. 1626.

1628.

2 Sept.
1629.

This having alarmed the persons who were possessed of those grants, application was made to the King, in name of some of the grantees, in order, if possible, to have their properties secured to them: the consequence of which was, that several commissions were granted by the King for settling those matters; and the parties interested also submitted their respective rights to his Majesty; who pronounced four several decrees-arbitral thereupon. Several acts of Parliament also were passed, and commissions granted for the better regulating those affairs; the purport of which shall be afterwards explained.

27th Jan.
1627.

Prior to these submissions, and with a view of bringing matters to an accommodation with those whose rights were brought under challenge, the King had, in 1627, granted a commission under the great seal, to certain of the clergy, nobility, and barons, empowering them to treat with the proprietors concerning the erection and temporalities of benefices, teinds, parsonage and vicarage, and certain other matters, which his Majesty alledged were the property

erty of the crown, or principality, and had been unlawfully acquired by his subjects. This commission was called the commission of *sur-renders and teinds*; and was only to subsist till the first of August 1627; but was afterwards renewed three several times, with some trifling variations.

1630. July
9. Nov.
16.
1631. Jan.
7.

These commissioners, in consequence of a warrant from the King, gave directions to the several presbyteries, to make choice of proper and indifferent persons, within their respective presbyteries, to be sub-commissioners for trying the valuations of tithes, according to particular directions sent to them for that purpose, and to report these nominations to the general commission.

Upon such report by the presbyteries, sub-commissions to the persons named were issued by the general commission empowering the subcommissioners to inform themselves of the true worth of the lands of each parish, in stock and teind, where the land had been possessed in stock and teind in time bygone, and what the lands pay presently, what they have paid in time bygone, and what they may pay of constant rent of stock and teind in time coming;" and to report to the general commission the true worth thereof, in constant rent; and also to inform themselves of the constant

stant rent and worth of the teinds, great and small, where the teinds were drawn separate from the flock, by the titular or his tacksmen not being heritors, for the space of seven years within fifteen years preceding the date of the commission.

The subcommissioners were also impowered in case the heritor should desire it, to try the rent of the land along with the teind, according to the true and constant rent of the land. This commission, in compliance with the King's demand, declared that he had a right to particular yearly sums specified by them, out of the erected tithes, by way of annuity. This right was rendered more effectual in 1633, when a grant in Parliament was made to his Majesty of an annuity of 6 *per cent.* out of all the teinds of the kingdom, excepting the teinds then allocated to bishops, ministers, hospitals, and other pious uses when the teinds were payable in money; and when payable in victual, then of certain proportions therein mentioned.

As the annuity was declared by the act not to be annexed to the Crown it was conferred by his Majesty on James Livingston, a groom of his bedchamber, in security of a sum of 10,000 sterling; which right was afterwards acquired by the Earl of Loudon: and in 1664, the levying of the annuity was stopped by the King's

St. 1633.
c. 15.

Stair's Inst.
b. 2. tit. 8.
§ 13.

warrant

reat an warrant ; since which time it has never been
parate demanded.

By another act, in 1633, it is ordained, " That St. 1633.
c. 17.
there shall be no teind-sheaves, or other teinds,
parsonage or vicarage, led and drawn within
the kingdom ; but that each heritor and life-
renter of lands shall have the leading and
drawing of their own teind, the same being
first truly and lawfully valued, and they pay-
ing therefore the price after specified, in case
they be willing to buy the same, or otherwise
paying therefore the rate of the teind after
specified : " and it is thereby also declared,
That the just and true rate of teinds is, and
shall be, the fifth part of the constant rent
which each land payeth in stock and teind,
where the same are valued jointly ; and where
the teinds are valued apart and severally, that
the just rate thereof is, and shall be, such as
the same is already, or shall be hereafter va-
lued and proved before the said commis-
sioners or sub-commissioners, deducting the
fifth part thereof for the ease of the heritors ;
reserving always liberty to such as shall find
themselves enormly hurt by the leading of
the said valuations, to pursue for rectifying of
the same, before the commissioners appointed
by his Majesty and estates for that effect." St. 1633.
c. 17.
and it is also thereby declared, " That the

“ price of all teinds which may be sold, consist-
 “ ing either in money or victual, or other bod-
 “ dies of goods is, and shall be, ruled and esti-
 “ mated according to nine years purchase; the
 “ prices of victual, and other bodies of goods
 “ whereof the teind consists, being redacted in
 “ money, according to the worth and price of
 “ victual and goods in each part of the country
 “ to the which the same is, and shall be prized
 “ and estimate by his Majesty’s commissioners
 “ appointed, or to be appointed, to that effect.

The same act provides, That in case an heritor of lands life-rented by another person, shall purchase his teinds, the life-renter shall be allowed to draw his own teinds, upon payment of the rate at which they are valued; and that if the teinds are not purchased, both heritor and life-renter shall have the drawing of their own teinds, at the aforesaid rates.

In order to carry into execution the decrees arbitral pronounced by the king, a new commission was appointed by Parliament in the year 1633. By this commission, the commissioners are empowered to prosecute and follow forth the valuation of whatsoever teinds, parsonage or vicarage, were then unvalued; and “ to receive
 “ the reports from the sub-commissioners appointed within ilk presbytery, of the valuation of whatsoever teinds led and deduced be-

St. 1633.
c. 19.

“ for

forè them, according to the tenor of the sub-commissions direct to that effect; and to allow or disallow the same, according as the same shall be found agreeable or disagreeable from the tenor of their sub-commissions."

The commissioners are also impowered "to rectify whatsoever valuations, led, or to be led, to the enorm prejudice of the titulars, and to the hurt and detriment of the kirk, and prejudice of the ministers maintenance and provision, or of his Majesty's annuity; and also to appoint committees, or sub-committees, of their own number, to receive the reports of the said valuations made, or to be made, and to receive, admit, and examine witnesses, and to take parties oaths, with their depositions, where the same is referred to oath; and to give such further power to the said committees or sub-committees of their own number, as they shall think fit; and if need be, to appoint sub-commissioners, not being of their own number, within any parochine or presbetrie of the country, for leading and deducing of the said valuations, and to receive the reports thereof, allow or disallow of the same; and, generally, to set down whatsoever order or course which shall be thought fit and expedient for dispatch of the said valuations,

“ rectifying thereof, or final closing of the
“ same.”

The commissioners are also impowered, “ a
“ ter the closing and allowance of the value
“ tions of ilk kirk and parochin, to appoint
“ modifie, and set down, a constant and local
“ stipend and maintenance to ilk minister, and
“ be paid out of the teinds of ilk parochin, ac-
“ cording to the tenor of the several acts of par-
“ liament.” And it is declared in the commis-
sion, that the provision to be made to ministers
shall not be under eight chalders of victual, or
800 merks Scots, (*i. e.* L. 44 : 8 : 10 $\frac{1}{2}$ sterling)
unless when, upon special reasons given, the
commissioners shall adjudge a less sum.

The commissioners are further impowered
“ to divide ample and spacious parochins, where
“ the same shall be found necessary and exped-
“ dient, or to unite divers kirks, in whole or in
“ part, to others, and to ratify and allow, after
“ trial and consideration, such union or dismem-
“ bering of parochins, as hath been formerly
“ made by virtue of the former commissions.”

They are likewise authorized “ to order, that
“ every heritor and life-renter of lands, shall
“ have the leading of their own teinds, parson-
“ age and vicarage thereof, they paying the
“ price contained in the act of parliament, in
“ case they be willing to buy the same from the
“ titular

of the titular having power to sell, or otherwise paying the rate of teind expressed in the said act: and to that effect the commissioners are empowered to set down the prices of saleable teinds, according to the worth thereof in each part of the country, where the same grow and are bred; and also to set down such good and ample securities, as may stand by law, both for the buyers of teinds, to the effect the titulars may be fully denuded in their favour; and also for security, to the titulars and sellers, of the price due to be paid to them for the said teinds; and also to set down the securities in favour of the titulars and of the ministers, so far as concerns the maintenance assigned to them, for good, thankful, and timeous payment of the rate of teind, where the same are not, or cannot be sold; and to discuss and determine all questions which may arise betwixt the titulars and heritors, anent the price of teinds, according to the nature and quality of the rights to be sold, whether the same be heritable or temporal, and to proportionate the price accordingly; and also to divide the price of teinds betwixt heritors and life-renters thereof, and betwixt titulars, tacksmen, and others, who have several and distinct rights to the said teinds saleable, according to the quality of their rights; and also to

“ cause

“ cause the titulars who sell their teinds, to exhibit their rights and titles, to the effect that they may be lawfully denuded thereof, in favour of the said heritors and life-renters respectively, (without prejudice to his Majesty’s annuity, &c.), and to decide and determine in all other points which may concern the leading and drawing of teinds, and buying of the same, or payment of the rate thereof.”

It is farther provided by the commission, “ That the vicarages of each kirk, being a several benefice and title from the parsonage, shall be severally valued.”

This commission being only temporary, several new commissions were granted by parliament to the like effect (*i*); particularly in 1690, and 1693: in the last of which, some new rules are laid down with respect to processes of sale of teinds, and allocation of ministers’ stipends.

St. 1690.
c. 30.

— 1693.
c. 23.

St. 1661.
c. 61.

By the commission in 1661, it is declared, That all valuations, acts, and decrees, concluded and decerned, by virtue of any commission granted by the pretended Parliaments in 1640, 1641, and downwards to the Restoration, shall

(i) St. 1641, c. 30.	1661, c. 61.	1686, c. 22.
1644, c. 24.	1663, c. 28.	1690, c. 30.
1647, c. 32.	1672, c. 15.	1693, c. 23.
1649.	1675, c. 28.	

stand

and valid, notwithstanding the general and particular rescissory acts passed in that parliament, excepting such decrees and sentences in favour of ministers for their stipends, or for dissolving, uniting, annexing, or building of kirks, which shall be found to have been unjustly or exorbitantly decerned; the determination of which is referred to the commissioners, who are empowered to annul or alter such decrees, conform to the laws preceding 1649.

In 1707, the power of these several commissions was vested in the Lords of Council and Session, and has continued so ever since. St. 1707.
c. 9.

By an act of King William, all tithes, not before that time heritably disposed, are declared to belong to the patron of the parish where the tithes lie; but subject always to tacks formerly granted, and prorogations thereof, as also to ministers' stipends, and all other burdens to which the tithes were formerly subjected. And the patron is obliged to sell to each heritor the tithes of his own lands, at *six years purchase*, according as the same shall be valued by the commissioners. St. 1690.
c. 23.

The benefit arising from this last act was afterwards extended to the patrons of all parsonages, and other benefices, without exception. St. 1693.
c. 25.

CHAP. II.

Of the Judges and the Officers of Court.

THE judges of this Court are now the same with those of the Court of Session; nevertheless the Courts are perfectly distinct. Each of them have their own proper officers, and their own proper jurisdiction.

The Court itself is, like the ancient commissions, called *the Commission for Plantation of Kirks and Valuation of Teinds*; and petitions and other applications to the judges, are addressed to the *Lords of Council and Session, as Commissioners for Plantation of Kirks and Valuation of Teinds*.

Nine of the judges are a *quorum*, as in the Court of Session.

In this Court there is only one principal clerk, whose office is presently held by two nominees jointly. This officer was formerly appointed by the Lord Register, but now he has his commission for life from the King. There is also one depute-clerk, who acts under the principal clerk, by a commission for life. This department likewise is at present under a conjunct

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nomination. And there is besides one extra-
ordinary, appointed also by the principal clerk.

By the act constituting the Court, the macers
of privy council, who attended the former com-
missions of Parliament, are ordered to attend and
officiate in this Court. These officers are now
reduced to two, who are understood to be in the
nomination of the judges.

The Court is appointed to sit every Wednes- St. 1707.
day in the afternoon, during the time of session; c. 9.
and it accordingly sits every Wednesday imme-
diately after the business of the Court of Session
is over.

C H A P. III.

Of the Jurisdiction of the Court.

THE jurisdiction of the Court is very parti-
cularly set forth in the act by which it is
constituted. By that act the Lords of Session St. 1707.
are authorized and impowered to judge and de- c. 9.
termine "in all affairs and causes whatsoever,
which by the laws and acts of Parliament of
this kingdom were formerly referred to, and
did pertain and belong to the jurisdiction and
cognizance of the commissions formerly ap-

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"pointed

“ pointed for that effect, as fully and free
 “ in all respects, as the said Lords do, or ma
 “ do, in other civil causes; and particular
 “ but prejudice to the generality foresaid
 “ to determine in all valuations and sales
 “ teinds, to grant augmentations of ministe
 “ stipends, prorogations of tacks of teinds,
 “ disjoin too large parishes, to erect and bui
 “ new churches, to annex and dismembe
 “ churches as they shall think fit, conform
 “ the rules laid down, and powers granted, b
 “ the 19th act of Parliament 1633, the 23d an
 “ 30th acts of the Parliament 1690, and the
 “ 24th act of the Parliament 1693, in so far
 “ the same stand unrepealed; the transporting
 “ of kirks, disjoining of too large parishes,
 “ erecting and building of new kirks, being a
 “ ways with the consent of the heritors of thre
 “ parts of four at least, of the valuation of the
 “ parish whereof the kirk is craved to be tran
 “ ported, or the parish to be disjoined, and ne
 “ kirks to be erected and built; the ministe
 “ in the mean time, to serve the cure in the
 “ present kirk of the parish.”

Stat. 1707.
 c. 9.

The records of this Court having been burn
 by an accidental fire, in order to supply the los
 the act further ordains, “ That any authentic
 “ extracts from the said records be brought in
 “ and being presented to the said Lords, be re

“ corded

corded in a particular register ; and that the said extracts so brought in, be kept by the Lord Clerk-register and his deputies, clerks to be appointed by him for that effect, as their warrants ; which shall be held and reputed as valid and authentic as the principal warrants themselves : and the Lord Register, and his deputies, are ordained to give a new extract, *gratis*, to every person that shall give in an old extract." And extracts from the new record are declared to be as effectual as the old ones. Upon proper evidents and adminicles, St. 1707. c. 9. the court is also authorised to make up the minor of decrees, whereof extracts are amissing, and the registers lost in the fire.

The powers of the former commissioners being fully transferred to this new Court, it has of consequence, by the act 1690, a power of judging of the sentences of former commissions, as well as of reviewing those of the present ; provided, That the ministers of the gospel, and their successors, shall not be prejudged of the depends, either then possessed by them, or which had been before that time, or should hereafter be, modified to them by the commission, at the rates therein mentioned. — 1690. c. 30.

The judges have likewise a power of regulating the form of proceedings before the Court. — 1653. c. 19.

P A R T II.

Of the Form of Procefs.

THE form of proceeding in this Court is in most respects fimilar to that observed in the Court of Seffion ; therefore fuch particulars only fhall be here mentioned as differ from thofe which we have fo fully confidered in the former part of this treatife.

The method we fhall obferve will be, treat

1. Of the preliminaries of procefs,
2. Of the proceedings in Court, after introduction,
3. Of extracts,

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CHAP. I.

Of the Preliminaries of Process.

SECTION I.

Of the Pursuer and Defender.

IN general, every person who has a claim which may competently be made the subject of a judgement of the court, may be a pursuer; and every person who has an interest to object to such claim, must be called as a defender.

The parties therefore must vary, according to the nature of the several actions in which they are concerned:

1. A process of valuation and sale of teinds is competent, at the instance of any heritor or life-renter of lands or other heritable subjects, out of which teinds are payable; and the proper defenders are, the titular and patron, tacksmen in possession of the teinds, and the minister of the parish where the tithes lie.

2. Where teinds have been valued by the subcommissioners, but that valuation not approved

proved by the general commission, a process of approbation of such valuation is competent, either at the instance of the heritor or liferenter of the lands out of which the teinds are payable, or of the titular, or patron if he has right to the tithes, and their tacksmen in possession of them. In this action the proper defenders are, the titular, or patron if he has right to the teinds, heritors, liferenters, tacksmen in possession of the teinds, and minister of the parish where they are produced.

The heritor or liferenter whose teinds are thus valued may pursue also a sale of them; which may be done either in a separate action or joined in the same libel with the approbation.

St. 1663.
c. 28.

— 1633.
c. 19.

This power in the Court to approve of valuations made by subcommissioners has been more than once called in question; not, as some have supposed, because the general commission granted by Parliament in 1663 does not authorise the commissioners to receive the reports from the subcommissioners; for that act ratifies, in the most express manner, the prior commission in the 1633 where that special power is granted; but because the powers vested in the subcommissioners being barely ministerial, to value and to report, their reports were deemed ineffectual, unless where they appeared to have been actually approved of by the principal commission.

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It has been adjudged, however, by repeated decisions, the last of which was affirmed upon appeal, that the Court has full power to approve of such valuations, in terms of the commission 1633, transferred to the session by 1707. c. 9.

Duke of
Montrose,
15th March
1758.

3. A process for modifying the stipend, payable to the minister, or having it localled upon the respective heritors and others liable in payment, may be pursued at the instance either of the titular, or the patron, if he has right to the teinds, or of the minister serving the cure. In this action the proper defenders are the titular, patron, tacksmen of the teinds, heritors, liferenters, and minister, leaving out the pursuer. And the same defenders must be called in a process at the minister's instance, for an augmentation of stipend.

4. As an augmentation has the effect to throw a burden on the tacksmen, where the teinds are under lease, to which he is not subjected by the terms of his tack, it is generally followed up by a process at the lessee's instance for a prorogation of his tack, as an equivalent for the burden imposed. The proper defenders in this action are, the titular, or the patron, if he has a right to the tithes, and the heritors and liferenters whose teinds are comprehended under the tack.

5. Actions for transporting of churches, dissolving too large parishes, and erecting or building

ing new churches, may be brought at the instance of heritors possessed of lands to the extent of three fourth parts of the valued rents of the parish, or at the instance of the patron or the presbytery alone; and the proper defenders are, the titular, patron, heritors, liferenters, ministers of the parishes to be united or disjoined, and the presbytery within whose bounds such parishes lie; leaving out the person at whose instance the action is brought.

The consent of three fourth parts of the valued rent is, by the act 1707, required in transporting churches, disjoining parishes, and building or erecting new churches. This proviso of the act, however, in so far as regards the erection of churches has been explained so as to apply to the building of a new church in the old parish, or transporting a church from one parish of the parish to another, but not to the annexing or uniting of parishes, it being understood that the heritors have not the same interest to oppose such union, or annexation; and that in such cases the court, without such consent, may judge of the most proper spot for the church of the united parish.

6. Any person who thinks himself injured by a decree, may bring a process of reduction of it in which he must call, as defenders, all the persons concerned in the decree to be reduced, or their dispoones or representatives.

18th July
1750.
Parish of
Kirknew-
ton.

With

With regard to this action, it is by the commission 1690 provided, that "where valuations are lawfully led against all persons having interest, and allowed by former commissions, the same shall not be drawn in question, nor rectified, upon pretence of enorm lesion at the instance of the minister (not being titular), or at the instance of their Majesties advocate, in respect of his Majesties annuity; except it can be proven, that collusion was used betwixt the titulars and heritors, or betwixt the procurator-fiscal and the heritors and titulars; which collusion is declared to be, when the valuations are led with the diminution of the third part of the just rent which was payable the time of the valuation; which diminution shall be proven by the party's oath."

7. An action for proving the tenor of any decree which has been lost, and whereof the record is destroyed by the fire which happened in the year 1700, is competent to any person having an interest therein; and all others having interest in the decree, must be called as defenders.

If, at the time of commencing any of these actions, the parish concerned happen to be vacant, the presbytery must be called as a party to the action: and in executing the summons,

H h

all

all the members may be cited when assembled in presbytery, by delivering one copy of citation to the moderator in name of the presbytery; but if the summons is not executed while the presbytery is sitting, each of the members must be cited in common form.

When his Majesty has an interest in any of these processes, the officers of state are called defenders for his Majesty's interest, by affixing an execution on the wall of the court of exchequer, and by an edictal citation against them at the market cross of Edinburgh, and pier and shore of Leith.

SECTION II.

Of the Summons and Execution.

THE summons in this Court, as in the Court of Session, is issued in the King's name, and under his signet, and is executed by a messenger at arms; but it differs from summonses before the Court of Session in the following particulars.

St. 1707.
c. 9.

1. It is signed by the clerk of Court, and retained by a clerk to the signet.

2. It is issued blank, and may be executed before the libel is filled up; whereas every summons in the Court of Session must be complete before it passes the signet.

3. It proceeds upon one diet of six days, if the defender reside in Scotland; except in Orkney or Shetland, in which case he must be cited on forty days; and if forth of Scotland on sixty days.

The parsonage and vicarage teinds being separate benefices, must be separately valued; and therefore in a process of valuation the libel ought to contain that separate conclusion.

St. 1663.
c. 19.

SECTION III.

Of the calling and inrolling of Summonses.

WHEN the day of compearance is passed, the summons may be called. This is done by the clerk on the Wednesday immediately before the sitting of the court; and if appearance is made for the defenders, it is given out to be seen and thereafter returned, as in the Court of Session; but the form of tabling and returning defences with the process is not in use.

By the act of Queen Anne the Court is ordained to call and discuss processes summarily, conform to a roll to be made up and kept by the clerk. And in conformity thereto an act of *federunt* was made in 1707, ordering the clerk to keep a book for the inrolment of causes; from which he is to make out, and affix on the

St. 1707.
c. 9.

A. S. 11th
June 1707.

walls of the inner and outer-house, two rolls of causes each Monday morning, viz. one roll of *ordinary actions*, and another roll of *concluded causes*.

A. S. 31st
Jan. 1711.

As soon as any summons is called, where his Majesty has an interest, the clerk of court must give notice thereof to his Majesty's advocate or solicitor for tithes, in order that they may appear, if they see cause, for the interest of the Crown.

SECTION IV.

Of Tithes which cannot be sold.

THOUGH all heritors throughout Scotland in general enjoy the privilege not only of valuing and drawing their own tithes, but also of purchasing them at an easy rate; yet that privilege, in so far as regards the purchase, is subject to the following exceptions:

St. 1690.
c. 30.

— 1693.
c. 23.

1. Tithes allocated for a minister's stipend.
2. Tithes of lands which have been feued out by an heritor having right both to stock and tithe, either without disposing the tithes, or with an express reservation of them.
3. Tithes formerly belonging to bishops and now to the King.
4. Tithes belonging to colleges and hospitals, or mortified for other pious uses.

These

These teinds may all be valued, though the proprietors cannot be compelled to sell them. After such valuation the heritors are intitled to draw their tithes upon payment of the proven value, excepting the tithes payable to ministers in name of stipend, which must be paid either in kind or money, according as they are ascertained by the use of payment, or by a decree in favour of the minister.

CHAP. II.

Of the Proceedings in Court after the Cause is inrolled.

IN a valuation and sale of tithes, the pursuer being intitled to draw his own tithes from the date of citation; he is bound to proceed in due time to discuss the action; therefore if he shall not insist in his process, and shall allow a protestation to go against him, he is not intitled any longer to draw his own tithes.

St. 1693.
c. 23.

As there is no minute-book in this Court, such protestation cannot be obtained until the summons is called in course of the roll; when the defender's

These

defender's advocate may insist for it, if the pursuer does not chuse to proceed in his action.

The proceedings, after the cause is inrolled are various, according to the nature of the action. But they may be comprehended under the two following heads: 1. General rules applicable to every process; 2. Rules peculiar to particular actions.

SECTION I.

General Rules, applicable to every Process.

EVERY cause is heard by the Court in the first instance, and not by an Ordinary, as in the Court of Session.

When a cause is called in course of the roll, and deleted on the absence of the pursuer, the clerk is discharged to inrol it again, until payment of a fine of 10s. to the poor. But this act is not in due observance.

A. S. 8th
Nov. 1738.

Forbes on
Tithes,
c. 9. § 2.

20th July
1664.

The commissioners appointed in 1627 made an order, that all procurators compearing before them, should have written mandates registered in the commission-books. This is gone into disuse. But a decree given upon an advocate's consent, not subscribed by him, was found null.

At calling parties are respectively a decision a proof is pronounced and granted commissio

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At calling of the cause in course of the roll, parties are heard on the libel and defences respectively ; after which, if the cause is ripe for a decision, the Court gives judgement : but if a proof is necessary, an act of *litiscontestation* is pronounced, allowing a proof to both parties, and granting diligence for citing witnesses, and commission if required.

The execution of the first diligence being reported, the Court will grant a second diligence, if necessary. This is obtained by a motion from the bar upon calling the cause, which must be inrolled for that purpose.

After the proof is concluded, and the day assigned by the act is elapsed, the cause is again inrolled ; when the Court makes *avifandum* with the proof, and grants circumduction, *quoad ultra*, and remits the cause to an Ordinary to prepare the state ; after which, the proceedings are the same as in a concluded cause before the Court of Session.

The Ordinary for examining witnesses, and preparing states in this court, is usually the Lord Ordinary officiating in the outer-house in the Court of Session for the time ; but, in a process of modification and locality, when an Ordinary has prepared a state in the modification, it is usual to remit to him to prepare the state in the locality also.

When

When a cause is remitted to an Ordinary, it is inrolled in his hand-roll; and called at the side-bar in the morning, along with the other causes depending before him as a judge in the Court of Session.

If a party thinks himself aggrieved, he may offer a representation to the Lord Ordinary against any interlocutor, as in the Court of Session; but there is no limitation either as to the time for giving in such representations or the number of them.

Petitions to the whole Court, against judgments of the Ordinary, are likewise competent; but neither is there any limitation as to the time for preferring such petitions.

A. S. 31st
Jan. 1722.

By an act of *federunt* in 1722, the clerks are discharged to receive any more petitions than one against *an interlocutor of the Court*; and it is thereby declared, "That the Lords will not receive any more reclaiming petitions than one, unless upon new documents or matters of fact, and sufficient evidence given that the same was recently come to the party's knowledge."

— 22d
Feb. 1749.

These petitions against interlocutors of the Court are ordered not to be received, unless given in on or before the *third* federunt-day after the interlocutor reclaimed against is pronounced.

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Petitions, answers, and informations, are ordered to be put into the Lords' and clerks' boxes (*k*) on the Tuesday afternoon preceding the day of advising; except petitions for recording decrees of former commissions; and petitions against acts or decrees ready to be extracted, when there is no time for making copies of the petition. These may be given in to court, without being put into the boxes.

A. S. 7th
Dec. 1709.

Anciently wakening was not necessary in actions depending before this Court; but the process which had depended before former commissions, not having been called for several years prior to the last establishment of this Court in 1707, an act was made ordering such processes to be wakened by a summons; and though this act seems only to relate to processes then in dependence, yet use has extended it to every process in the Court which has lain over uncalled for year and day, as in the Court of Session.

— 26th
Mar. 1707.

When any of the defenders happen to die during the dependence, his heir may be called by an incident diligence, a summons of transference not being necessary. In order to obtain such diligence, the cause is inrolled, and a motion made by counsel from the bar.

(*k*) The Lords boxes are the same in this Court as in the Court of Session; and the papers must be put in before twelve o'clock.

SECTION II.

*Rules peculiar to particular Actions.*1. *Process of Valuation and Sale.*

IN this action it is to be observed, with respect to the proof, that there must be proper evidence, not only of the present rent of the lands out of which the tithes to be valued are payable, but also of the rent paid for the lands for a course of seven years past; and if grassums have been paid by the tenants, these should likewise be proved, in order to ascertain the true rent.

If the lands, or any part of them, are in the heritor's own hands, a proof must be taken of their annual produce, and what they would yield if let to a tenant. It is necessary to have also a proof of the value and expense of improvements made on the lands within the preceding seven years; because a reasonable deduction will be allowed by the Court for such improvements in the valuation; and, for the same reason, a distinct proof should be brought of the rent of mills, and of all legal deductions, either from the rents or teinds.

The titular being liable for the King's annuity, while he retains the property of the tithes, there

there is no deduction made upon that account, in a process of valuation; but in a process of sale a deduction is given, and the purchaser is ordained to relieve the seller of the annuity in time coming.

Where the teinds have been valued separately from the stock, a fifth part thereof must also be deducted in reckoning the price. This deduction is called the *King's ease*. St. 1633.
c. 17.

The titular and patron respectively should be ordained to produce their title-deeds and rights to the tithes; because, according to these several rights, the price is fixed at a greater or a less sum; the titulars being intitled to *nine* years purchase, and the patron only to *six*; and in case there are several persons pretending to have an interest in the tithes, such as heritors and life-renters, titulars, patrons, or tacksmen, it should be ascertained by the Court what share of the price each of them is intitled to. Ib. c. 19.
— 1690.
c. 23.

2. *Process of Modification and Locality.*

This action consists of two distinct branches; one a modification, the other a locality. By the first of these the amount of the stipend is ascertained; by the other is fixed the proportion to be paid out of the teinds of each heritor's lands.

Besides the stipend to the minister, there is commonly a sum modified for furnishing communion elements, which is more or less according to the number of people in the parish.

In this process the minister gives in a rental of the lands in his parish, subject to pay teind and refers the verity thereof to the oaths of such of the defenders as are of age, and leads a proof of the rents of the lands of such of them as are minors.

A. S. 14th
Feb. 1739.

When an act is pronounced, allowing the proof, the Court assigns the same term for the heritors to produce their rights to their teinds with certification.

No penalty being annexed to this certification, it has little or no effect, by which means these causes are often extremely tedious.

Though the two separate conclusions in this action are contained in one libel, yet a decree may be obtained and extracted in the modification, without proceeding to the locality; the effect of which is, to make the stipend a real alien on the tithes of the whole parish, and to subject the intromitters with the tithes *in solidum* to payment of the stipend, to the amount of their intromissions; but after the locality is ascertained and decree extracted, each heritor is only liable for his own proportion.

As the titular was understood to have been originally proprietor of all the tithes of the parish,

there is no power to allocate the stipend upon any part of the tithes he pleased, unless he was barred from such allocation by some deed of his own, such as a tack, or a disposition of the tithes, in favour of some other person: and this privilege was extended to patrons acquiring right to tithes by the acts 1690, and 1693. After the privilege of purchasing their own tithes was given to the heritors, it was frequently disappointed by the titulars, patrons, and their tacksmen, allocating to the ministers the particular teinds meant to be purchased. To remedy this inconvenience, the commission 1693 states and ordains, "That after citation, it shall not be in the power of the foresaid patrons, titulars, or tacksmen, to make any allocation of the pursuer's teinds solely, but only proportionally of his and the other teinds within the parish, and within his right; excepting always, that the teinds of the lands belonging in property to the patron, titular, or tacksmen, shall be free of any part of the allocation, if there be sufficient teind beside." St. 1693.
c. 23.

Some teinds are subjected in payment of stipend more directly; others only *subsidiarie*. In this matter, the order observed in allocating the stipend is as follows:

1. Tithes payable to the titular or patron respectively, out of other heritors lands.

2. The

2. The tack-duties and feu-duties payable to the titular or patron respectively, for tithes let or feued out by them. These two kinds are usually called *free teinds*.

3. Tithes let in tack by the titular or patron to the heritor.

4. Tithes heritably disposed by the titular or patron, and proportionally with these, the tithes of the lands belonging to the titular or patron himself.

Lands *cum decimis inclusis* are free from tithes and consequently are not subjected to the burden of the minister's stipend, and therefore cannot be localled upon.

The clerk of Court usually makes out the calcul and scheme of allocation ; after which the process is put in the Lord Ordinary's hands, and all parties are allowed to see and object to it ; which objections, with answers thereto and replies when necessary, are advised by the Lord Ordinary, when the objections made are sustained or repelled, as his Lordship sees cause. If repelled, the scheme of allocation is approved of ; if sustained, a remit is of new made to the clerk, with instructions to alter and amend the scheme, as occasion requires.

3. *Process of Prorogation of a Tack.*

This process may either proceed on a summons, or a decree of prorogation may be insisted for in the process of modification and locality Forbes on Tithes, c. 7. § 5. where all parties having interest are called; in which case, a summons has been found not to be necessary.

The time of prorogation granted is in proportion to the loss sustained by the tacksmen; and therefore the Court, before pronouncing a decree, usually remits to an accountant to make out a calcul of the loss, and of the number of years which ought to be granted for the tacksmen's indemnification.

PART

P A R T III.

Of Extracts.

A. S. 11th
June 1707.

IT has been already observed that there is no minute-book kept of the proceedings of this Court: the only regulation made by the Court with respect to extracts is, "That no act or decree can be extracted, until the Lords shall have met another diet, after pronouncing thereof."

St. 1707.
c. 9.

And, for supplying the lost records of the Court, any person possessed of an extract prior to the 1707, is by the act of Queen Anne, intitled to have it recorded, which is obtained on a petition to the Court; and the clerks are ordained to give out a new extract thereof *gratis*.

APPEN

A P P E N D I X.

TABLE of FEES, payable to the CLERKS and OFFICERS of COURT,

Fees payable to the Clerks of Session.

FOR tabling a fummons,	L. o 2 9 $\frac{1}{2}$
(a) For the oath of a party taken in court,	- - o 2 2 $\frac{2}{3}$
b) For the same oath taken on commission,	- - - o 1 1 $\frac{1}{2}$
c) For the oath of a witness taken in court,	- - - o 1 1 $\frac{1}{2}$
d) For the same oath taken on commission	- - - o o 6 $\frac{2}{3}$
e) For calling an act in prefence of an Ordinary,	- - - o 2 6
f) For advifing fummarily a negative oath,	- - - o 4 10
g) For every intereft produced in rankings or other competitions,	o 4 10

(a) St. 1672. c. 16.

(b) A. S. 17th Nov. 1685.

(d) Add. reg. 1695.

K k

(d) For

- (d) For the whole production, in a reduction and improbation, though made at different times, L. o 4 10
- (d) For preparing concluded causes, such allowance as the Lord Ordinary shall modify, not exceeding - - - o 9 8
- (e) For recording each edictal citation in a ranking and sale, no more than - - - o 1 0
- (c) Each petition, * - - o 4 10
- (c) Each answer, * - - o 4 10
- (a) Extracting acts, decrees, protestations, and diligences, each *full* sheet, - - - o 5 0
- (c) Opposed to *full* sheets are those which are repeated out of acts and decrees formerly extracted in the cause, and which therefore pay each of them o o 8
- (c) And also petitions and answers, which are never reckoned by the number of sheets, but by the piece, each of them paying o 1 2

(d) Add. reg. 1695.

(e) A. S. 23d Nov. 1711.

(c) Act reg. 1695.

(a) St. 1672. c. 16.

* See note p. 92. which applies both to petitions and answers.

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cess,

- a) For the first sheet in decrees of
transumpt, transference, registra-
tion by way of action, and
commissions where there is no
dispute, - - - L. 0 5 0
- a) For the following sheets in these
decrees and commissions - 0 1 8
- d) For every diligence granted
without an act, - - - 0 4 10
- d) For preparing and writing ab-
breviates, each sheet of each
abbreviate - - - 0 1 2

Clerks-Assistant.

There is paid to the assistant
clerks, or closet-keepers, for
every representation, answer,
reply, condescendence, defence,
or other paper in a cause, 0 1 0

For every production of an interest
in rankings, multiplepointings,
or other processes, - 0 1 0

For giving out on receipt every pro-
cess, or a part thereof, - 0 1 0

(a) St. 1672. c. 16.

(d) Add. reg. 1695.

K k 2

And

And for lending out rankings, multiplepointings, or other processes attended with uncommon trouble, - - L. 0 2 0

And sometimes - - 0 2 6

For making out interlocutors of ranking and preference, a gratuity is paid suitable to the trouble occasioned.

Fees payable to Extractors.

(c) For each sheet in acts or decrees, - - L. 0 1 2

And a gratuity for writing is allowed them by their employers, usually from 1s. to 1s. 4d. each sheet.

Fees payable to the Keeper of the Minute-book.

(f) Putting up each protestation for suspensions, advocations, for not insisting, not inrolling, &c. 0 1 0

(c) Act reg. 1695.

(f) A. S. 9th Aug. 1776.

— 9th Feb. 1788.

(f) A

(f) At producing a suspension or advocacy at the minute-book, L. 0 1 0

For a warrant to extract a protestation, - - - 0 1 0

0 2 0 (f) For each judicial intimation in rankings, multiplepointings, or other processes, - - - 0 2 6

For a certificate that an advocacy or suspension was formerly produced, - - - 0 2 6

A certificate that a decree is in *foro* or in absence, - - - 0 2 6

(f) On each extracted act, whether of litiscontestation or before answer, and whether pronounced in the inner or the outer-house, 0 1 0

(f) On each extracted decree in processes, - - - 0 1 0

For putting up decrees in rankings, multiplepointings, adjudications, or others, against a number of defenders, a gratuity is paid, less or more, according to circumstances.

(f) A. S. 9th Aug. 1776.

— 9th Feb. 1788.

*Fees payable (g) to the Keeper of the Inner-house
Rolls.*

Short-Roll.

For every petition, information, memorial, condescendence, objection, answer, reply, duply, or other paper in a cause, appointed by the Lords to be paid at inrolling, - - L. 0 5 0

Ordinary Action and Summar Rolls.

For every action of proving the tenor, sale, aliment, *cessio bonorum*, account of expense, report from a Lord Ordinary upon a remitted petition for money, getting up bond of caution, or any other cause, to be paid for each inrollment, in whole, - - 0 5 0

(g) A. S. 11th March 1791.

Concluded

Concluded Cause Roll.

For inrolling every prepared state, or memorial and abstract in a sale, to be paid by each party,	L.	0	5	0
Or, in whole, - - -		0	10	0
For each day's pleading upon a hear- ing in prelence, - - -		0	10	0

Single Bill Roll.

For every reclaiming petition refused by the Lords, without an answer, to be paid by the petitioner,	-	-	0	2	6
At the admission of every Notary,	0	5	0		

The act regulating the above fees, appoints the keeper to affix on the walls of the outer-house, each day before one o'clock, a roll of the single bills, in the order in which they are to be moved by the Lords the succeeding day.

And it declares, That in no case there shall be more than one actual inrolment before admitting.

*Fees payable (b) to the Keeper of the Outer-house
Rolls.*

For inrolling, printing the rolls, affix-
ing the same on the walls, and
furnishing copies to the mem-
bers of court, each process L. 0 2 0

*Fees payable (i) to the Clerks of the Ordinary
Lords.*

When a cause is pled in the outer-
house and taken to *avisandum*,
each party pays - - 0 3 0
For every inrolment in the hand-roll,
the party inrolling pays 0 3 0
At giving in representations, conde-
scendences, memorials, objec-
tions, answers, replies, duplies,
accounts of expenses, or any
other paper in a cause, appoint-
ed by the Lord Ordinary, there
is paid for each paper, by the
party giving it in, - - 0 3 0

(b) A. S. 9th, 14th July 1789

(i) — 1st Aug. 1789.

When

ter-house	When objections are made to witnesses, or to questions put to witnesses, and advised by the Lord Ordinary in the cause, or by the Lord Ordinary on oaths and witnesses, each party pays L.	3	0
2 0	When a cause is reported, each party pays	3	0
Ordinary	When <i>avisandum</i> is made with a prepared state, the party craving the <i>avisandum</i> pays	3	0
	At comparing memorials and abstracts in sales, the agent carrying on the sale pays	6	0
3 0	When sales are reported, there is paid for reporting each lot	6	0
3 0	At advising a state of interests in rankings or in multiplepointings, consisting of fix interests or more,	10	6
	If fewer than fix,	5	0
3 0	For every bill of suspension or advocacy passed or refused upon answers, or on a hearing, there is paid, by each party,	3	0

When

L1

Fees

Fees payable to the Clerks of the Bills.

(k) For each common bill of hording, caption, arrestment, or other diligence, -	L.	0	0	1
(k) But if not presented at office hours, - - -		0	0	6
(a) For every bill of suspension, -		0	6	1 $\frac{1}{2}$
(a) And if more suspenders than one, for each person after the first, till they come the length of ten, after which no additional fee is exigible, -		0	0	6 $\frac{1}{2}$
For every bill of advocacy, -		0	4	2
For answers to each bill of suspension or advocacy, - -		0	5	0
(k) For replies thereto, -		0	5	0
For duplies, - -		0	2	6
For passing the bill, - -		0	3	6
For prorogating the time to find caution, - - -		0	2	6
For receiving bond of caution, -		0	1	0
For certificate that no caution is found, - -		0	3	6

(k) A. S. 11th March 1789.

(a) St. 1672. c. 16.

For

	For certificate of a bill being re-				
	fused, - - -	L. o	3	6	
17s.	(l) For extract of a decree for ex-				
	penses, - - -	o	2	o	
	(m) For a commission for taking a par-				
	ty's oath, - - -	o	3	4	
o 1	(d) For recording the abbreviates of				
	adjudications, if contained in				
o 6	two sheets, - - -	o	3	4	
6 17	(d) When more than two sheets,	o	6	8	
	(n) For extracting these abbreviates,				
	half the dues of recording.				

Fees payable to the Macers.

o 6r	(g) On the first inrolment of any				
4 2	cause in the outer-house,	o	1	o	
5 o	(g) At presenting every bill of suf-				
5 o	pension or advocacy, - - -	o	1	o	
2 6	(o) On each oath of a party taken in				
3 6	court, - - -	o	2	o	

(l) A. S. 19th Dec. 1778.—7th March 1782.

(m) — 6th Dec. 1718.

(d) Add. regl. 1695.

(n) A. S. 18th Jan. 1715.

(g) — 11th March 1791.

(o) — 15th Feb. 1681.

On

For

(o) On every oath of a party taken on commission, -	L. 0	1	0
(o) On the deposition of every wit- ness taken in court, -	0	1	0
(o) On every such oath taken on commission, - -	0	0	6
On each extracted decree, -	0	2	0
On every extracted act, -	0	1	0
On each extracted protestation for not producing suspensions or ad- vocations, or for not insisting in ordinary actions, - -	0	1	0

(o) A. S. 15th Feb. 1681.

A BIDIN
Abb

Abstract

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